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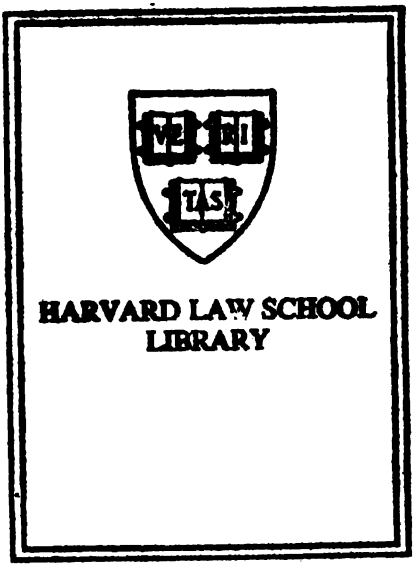

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REPORTS

OF

CIVIL AND CRIMINAL CASES

DECIDED BY THE

COURT OF APPEALS

OF KENTUCKY.

VOLUME XX.

T. R. McBEATH, Reporter.

VOLUME 127, KENTUCKY REPORTS.

Containing Cases Decided from Oct. 30, 1907, to Jan. 23, 1908

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DECISIONS

OF THE

COURT OF APPEALS OF KENTUCKY

SEPTEMBER TERM, 1907

CASE 1. — ACTION BY THE MT. STERLING OIL & GAS CO. AGAINST C. S. RATLIFF, SHERIFF, TO ENJOIN THE COLLECTION OF CERTAIN TAXES.—October 30.

Mt. Sterling Oil & Gas Co. v. Ratliff, Sheriff

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Appeal from Bath Circuit Court.

A. W. YOUNG, Circuit Judge.

Judgment for defendant, plaintiff appeals. Reversed.

1. Taxation—Liability of Property—Statutory Provisions—Interest in Oil Privileges.—Under Ky. Stats., 1903, section 4039, providing that it shall be the duty of all persons owning any interest in coal oil privileges in the State, if they should reside out of the State, to list the property for taxation in the county where situated, where the owner of an oil leasehold assigned it to another and reserved as a part of the consideration therefor a fraction of the oil to be produced therefrom, the interest reserved was property subject to taxation in the county wherein the oil wells were situated within the intent of the Legislature, even though the owner was a non-resident.
2. Same—Assessment—Notice.—Ky. Stats., 1903, section 4122, providing that the sheriff shall notify all taxpayers whose lists have been increased or assessed by the board of supervisors of tax, is mandatory; and, where an original assessment of omitted property is made by the board without notice, it is void, notwithstanding section 4128, declaring that mere informalities or irregularities on the part of the board shall not invalidate an assessment.

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3. Same—Remedies of Taxpayer—Injunction.—Where a tax is imposed by the board of supervisors of tax without notice to the taxpayer, as required by Ky. Stats., 1903, section 4122, the collection of the tax may be enjoined, notwithstanding section 4128, providing that a taxpayer aggrieved by the action of the board may apply to the county judge for redress.

ROBERT H. WINN, attorney for appellant.

J. J. NESBIT, attorney for appellee.

(No briefs—record misplaced.)

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

Appellant, an Indiana corporation, owned prior to September 1, 1905, certain oil leaseholds in Bath and other counties of Kentucky, which it on that date sold and assigned to Guffey and Galey, Pennsylvania oil men, for a certain consideration based upon a test of production, and then paid, and an additional consideration expressed in the following clause of the written contract between the parties, viz.: "The second parties covenant to render and deliver to the first party, in its crude state, delivered in tanks or pipe lines in the vicinity of the wells an equal one-sixteenth of all the oil produced and saved after this date from any of said leaseholds this day assigned, after deducting the royalty to be rendered to the lessor. The said second parties shall, until the first party elects to take and dispose of its oil, sell the oil of the first party with their oil and account for and pay to the said first party quarterly for the oil so sold in the crude state at the wells during the preceding three months; the minimum price to be not less than twenty cents per barrel." The New Domain Oil & Gas Com-

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pany subsequently became assignee of the rights of Guffey and Galey under the contract in question. In January, 1906, the board of supervisors of Bath county assessed for taxation as of September 1, 1905, in the name of appellant as owner, its interest in the Bath county oil leaseholds reserved in the assignment to Guffey and Galey, styling it upon the assessor's book, "Present value of annuities and royalties," and fixed the value thereof at $20,000, the tax upon which went into the hands of appellee as sheriff of Bath county for collection. The payment of this tax was demanded by the sheriff of appellant, who refused to pay it, and immediately thereafter it brought this action in the Bath circuit court against that officer to enjoin its collection. The petition rests appellant's claim to the relief asked on two grounds: (1) That a right to receive one-sixteenth of the oil produced from a well, the owner of the right having parted with his leasehold and not being engaged in the production of the oil, is an intangible personal asset, the situs whereof for taxation follows the domicile of the owner; (2) that the assessment by the board of supervisors, having been made without notice to appellant, is void.

The first contention is manifestly unsound. Whether the right reserved to appellant by the lease contract to one-sixteenth of the oil produced by its assignee be called personal property, a chattel real, incorporeal hereditament, or privilege, it is property and as such subject to taxation, under section 4039, Ky. Stats. 1903, which provides: "That it shall be the duty of all persons owning any real or personal property, mineral rights or standing (branded) trees of any kind whatever on the lands of another, or any coal oil or gas privileges by leases or otherwise,

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or any interest therein, in this State, other than the county in which the said owners reside, or if they should reside out of the State, to list the property for taxation, personally or by an authorized agent, in the county where situated, at the same time and in the same manner as is now required by law of resident owners, or to file a descriptive list of the same between the 15th day of September, and the 15th day of October in each year, with the county court clerk of the county where said property is located, fixing a fair cash value of the same, and giving the nearest resident thereto, and the number of the magisterial district in which same is located. Whoever shall wilfully fail or refuse to comply with the provisions of this act shall be fined not exceedng $50.00 to be recovered by an indictment in the county in which the same is situated; provided, that no fine shall be assessed when the property is assessed and taxes paid by the owner or his agent. That all actions and prosecutions now pending, in which judgment of conviction has not been rendered, shall proceed under the provisions of this act." By the use of the words "any coal oil or gas privileges by lease or otherwise, or any interest therein," the Legislature intended to make just such an interest or privilege as appellant owns in the oil produced, or a right to a part of what may be produced by its assigns, property, and to tax it as such in the county where it is situated, the privilege exercised, or the benefit received, though the owner be a nonresident of the county or of the State. Commonwealth, by etc., v. R. G. Dun & Co., 126 Ky. 108, 102 S. W. 859, 31 Ky. Law Rep. 561.

Appellant's second contention presents a more serious obstacle to the right of the sheriff to proceed

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with the collection of the tax assessed against it. It is admitted that no notice of the assessment was given appellant, but insisted for appellees that none was required because the assessment was an original one. In other words, appellee contends that the statutory requirement as to the giving of notice to the owner of the property sought to be taxed has no application to an original assessment made by the board of supervisors, but does apply to an increase made by it in the valuation of property previously assessed. The language of the statute does not sustain appellee's view of the law. While the board of supervisors seem to be empowered to assess all property that may have escaped the notice of the assessor, even though the name of the owner be undiscovered, it is without authority either to assess or increase an assessment of property without notice to the taxpayer, for we find that section 4122 of the statute, which defines the powers of the board, provides: "The sheriff shall notify all such taxpayers whose lists have been increased or assessed by the board, and also notify them of the time to which the board adjourned. Notice to non-residents or infants shall be to their attorney or agent or guardian; if none in the county, by posting in some conspicuous place on the premises. The sheriff shall be allowed a reasonable compensation for his services to be paid out of the county levy." The succeeding section, 4123, provides for the re-assembling by the board to hear the complaints of persons whose property it may have assessed or increased, and indicates the manner in which such complaints shall be disposed of. We fail to see that section 4122, in its requirement as to the notice to be given the taxpayer, makes any distinction between an orginal assessment and an

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increase of assessment. In either case, the purpose of the notice is to give the taxpayer an opportunity to appear before the board and be heard upon the proposed assessment or increase. If entitled, therefore, to notice and a hearing on the question of whether an increase shall be made in the value of the property listed by him, he is equally entitled to a hearing on the question of whether property which he has failed to list shall be assessed at all. But we regard this question as having practically been settled by this court in the case of Negley v. Henderson Bridge Company, 107 Ky. 414, 54 S. W. 171, 21 Ky. Law Rep. 1154. The question presented in that case was whether an increase in the valuation of the bridge company's property, which had previously been assessed, could be made by the board of supervisors without notice to the company. The opinion after commenting upon the provisions of section 4122 of the statute, supra, says: "Under the provisions of the statute, neither the assessor or board of supervisors can increase the valuation placed by the taxpayer upon the property listed by him without notice to the taxpayer of such increase. The purpose of these provisions is to give the taxpayer an opportunity to appear before the board and be heard upon the proposed increase. * * * The increase in the valuation by the assessor of the property listed by the plaintiff, without the notice to it required by the statute, and the failure on his part to report the change made by him in plaintiff's list to the board of supervisors, are fatal to the validity of such assessment, and the chancellor properly enjoined the collection of the taxes." It is true that section 4128 declares that mere informality or irregularity on the part of the board of supervisors shall not invalidate

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an assessment, and that a taxpayer aggrieved by the action of the board may apply to the county judge for redress; but the act of the board here complained of was not a mere informality or irregularity—it was an omission of duty fatal to the attempted assessment. The requirement of the statute as to the giving of the notice to the taxpayer is mandatory, and, in the absence of the notice, the act of the board in assessing appellant's property was and is void; hence, appellant was not required to appeal to the county judge for relief, but had the right to enjoin the collection of the tax illegally imposed.

We would not, however, be understood, as holding that the property in controversy should not have been assessed. It may yet legally be assessed and taxed in accordance with the provisions of the statute for the years appellant has failed to list and pay taxes upon it.

For the reasons given, the judgment of the lower court is reversed, and cause remanded, with directions to perpetuate the injunction as to the tax attempted to be collected by appellant by virtue of the illegal assessment of the board of supervisors.

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CASE 2.—ACTION BETWEEN THE FISCAL COURT OF JEFFERSON COUNTY AND JOHN P. PFLANZ AS TO THE DUTY OF THE JAILER TO PROVIDE LIGHTS, HEAT AND JANITOR SERVICE FOR THE ARMORY.—October 31.

Fiscal Court of Jefferson County v. Pflanz

Appeal from Jefferson Circuit Court; Chancery Branch; Second Division.

SAMUEL KIRBY, Judge.

From the judgment the fiscal court appeals. Affirmed.

1. Militia — Armories — Expense of Maintenance — Statutes — "Other County Buildings."—Ky. Stats., 1903, section 3948, provides that the "jailer of each county shall be superintendent of the public square, court-house, clerk's office, jail, stray-pen and other public county buildings at the seat of justice." Section 356 requires the jailer to furnish fuel, lights, and water to the circuit court rooms, and allows him $2 a day therefor, to be paid out of the State treasury. Section 1749 provides against the allowance of a fee bill for any ex-officio services. Held, That the duty and expense of maintaining, lighting, heating, and janitor's service for an armory erected at the seat of justice by the fiscal court at the expense of the county was not intended to be borne by the county jailer; the words "other county buildings" referring only to buildings of the smae class as those specifically mentioned in the section.
2. Same.—Act March 21, 1904, (Laws 1904, p. 127, ch. 52), provides that where state guard companies are organized and furnished with public arms, in any county, the fiscal court of the county shall provide at the cost of the county an armory for drill and safe place for keeping the public arms. Ky. Stats., 1903, section 1840, provides that the fiscal court shall have jurisdiction to appropriate county funds as author-

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ized by law, to erect and keep in repair necessary public buildings, and secure a sufficient jail and a place for holding court. Held, That, though a county must have a specific warrant of law for every obligation it assumes, the fiscal court may make such provision for the maintenance of the armory building as may be necessary; this power being incidental to the execution of the power to provide conferred by the statute.

R. L. PAGE, county attorney, for appellant.

1. The Jefferson county armory is certainly a public building and is the property of the county.

2. Section 3948, Ky. Stats., makes the jailer of each county the custodian of all public buildings at the seat of justice.

3. As custodian of the court-house the jailer receives nothing in the way of fees for janitor services. Such services are ex-officio, for which no fees are allowed.

4. The fiscal court is one of special and limited jurisdiction and has no power to appropriate the money of the county except as authorized by law. There is no statute authorizing it to make any kind of contract with the jailer.

AUTHORITIES CITED.

Ky. Stats., sections 3948, 356, 1749; Mitchell, Jailer, v. Henry County, 30 Ky. Law Rep., 1051; Wortham v. Grayson County, 13 Bush, 53.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

By an act of the Legislature, approved March 21, 1904 (Laws 1904, p. 127, c. 52), it was provided: "Where state guard companies have been or may hereafter be, organized, and furnished with public arms or equipments by the Governor, in any county of this Commonwealth, the fiscal court of said county shall provide, at the cost of the county, an armory for drill, and safe place for keeping such public arms and equipments, where they will be at all times

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accessible to the company." It is alleged in the petition in this case that companies of the state guard have been organized in Jefferson county and furnished equipments by the Governor, and that the fiscal court of that county has provided at the cost of the county an armory for drill and safe place for keeping the public arms and equipments of the guards. This controversy is whether the duty and expense of maintaining, lighting, heating, and janitor's service for the armory must be borne by the fiscal court on behalf of the county, or by the jailer.

Section 3948, Ky. Stats. 1903, provides: "The jailer of each county shall be superintendent of the public square, court-house, clerk's office, jail, stray-pen and other public county buildings at the seat of justice." The last-named section has been the law in this State for a number of years. Section 356, Ky. Stats. 1903, requires the jailer to furnish fuel, lights, and water to the circuit court rooms, and allows him $2 a day therefor, to be paid out of the State treasury. But as custodian of the courthouse he is allowed nothing in the way of fees for janitor's services. Such services are ex officio services for which the jailer receives no fee. It was so held in the case of Mitchell, Jailer, v. Henry County, 124 Ky. 833, 100 S. W. 220, 30 Ky. Law Rep. 1051. Section 1749, Ky. Stats. 1903, provides: "No fee bill shall be made out or compensation allowed hereafter for any ex officio services rendered or to be rendered by any officer." Concerning the general jurisdiction of the fiscal court over the public funds and property of the county it is provided (section 1840, Ky. Stats. 1903): "The fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair necessary public buildings

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secure a sufficient jail and a comfortable and convenient place for holding court at the county seat." There is no express provision authorizing the fiscal courts to incur the expenses necessary to light and heat and care for the other county buildings. Construing the language of section 3948, supra, under the rule ejusdem generis, the expression "other county buildings at the seat of justice" has reference to buildings of the same kind and class as those specifically mentioned. If, for example, the county almshouse should be located at the seat of justice, it would scarcely be contended that the county's poor should be provisioned, clothed, and housed at the expense of the jailer as an ex officio service, yet the counties of the Commonwealth are required to maintain their paupers. Counties may also install workhouses and appoint keepers thereof. Section 4867, Ky. Stats. 1903. Such workhouses may be established at the seat of the government of the county. While section 4868 provides for the appointment of managers, the language would not necessarily be in conflict with the duties imposed on the jailer by section 3948, Ky. Stats. 1903, if that section should be construed as is contended for by the appellant in this case. Other instances might be cited to the same effect. These illustrations taken from the statutes of the State confirm the construction we herein place upon section 3948, that "other county buildings" has reference to buildings of the same kind and class as those specifically mentioned in the section.

While a county may not become indebted by implication of law as private corporations may be, but must have a specific warrant of the law for every obligation they assume (Wortham v. Grayson County, 13 Bush, 53), we think it is necessarily im-

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plied in the statute which authorizes the county to acquire property and erect an expensive armory, and the statute which authorizes the fiscal court of the county to appropriate the county funds authorized by law to be appropriated, that the county must maintain the armory building, inasmuch as no other provision is made for its maintenance. The county must also provide a janitor or janitors, and provide for heating and lighting of such building as may be necessary. These powers are incidental and necessary to the execution of the principal power conferred by the statute. The purpose of the statute could not be effectuated otherwise, and it cannot be presumed that the Legislature intended that the counties might erect such buildings and not have the power to maintain them and keep them in fit condition for the use for which they were designed.

We conclude therefore that under the statute of 1904, and under the other statutes quoted above, the fiscal court of the county may take such provision for the maintenance and care of the armory building as may be necessary for its proper use.

Such was the judgment of the chancellor below, and it is affirmed.

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CASE [illegible] — PETITION BY A. T. HENDERSON AND OTHERS FOR MANDAMUS AGAINST R. D. DAVIS, COUNTY JUDGE OF BOYD COUNTY, TO COMPEL HIM TO ORDER A LOCAL OPTION ELECTION.—October 31.

Davis, County Judge, v. Henderson, &c.

Appeal from Boyd Circuit Court.

S. G. KINNER, Circuit Judge.

From an order overruling a demurrer the defendant appeals. Reversed.

1. Intoxicating Liquors—Local Option Election—Petition—Withdrawal of Signature.—Signers of a petition for a local option election may withdraw their names before the petition is acted on.
2. Words and Phrases—"Petition."—A petition is a formal written request or prayer for a certain thing to be done, the signers of which attach their signatures voluntarily.
3. Intoxicating Liquors—Local Option—Petition—Number of Signers.—Ky. Stats., 1903, section 2554, provides that on written petition, signed by a number of voters in such precinct of the territory to be affected, equal to 25 per cent of the votes cast in each of such precincts at the last preceding general election, and when for town or city elections, the number of votes cast at the last city or town election, it shall be the duty of the county court judge to order the election, etc. Held, That where a local option election is desired in a magisterial district composed of seven election precincts, five of which are within the limits of a city, the petition must be signed by a number of voters in each precinct equal to 25 per cent of the votes cast therein at the last preceding general election; a petition signed by 25 per cent of the voters of the entire district being insufficient.
4. Same—General Election—Construction.—The term "last general election," as used in Ky. Stats., 1903, section 2554, requiring a petition for local option election to be signed by 25 per cent of the votes cast at the last preceding

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general election means the last preceding general election at which officers for the State or county embracing the district in question were elected, and not the last congressional election.

S. S. WILLIS, attorney for appellant.

L. F. Zerfoss and E. B. Hager of counsel.

POINTS AND AUTHORITIES.

1. To obtain an order for an election in a magisterial district a number of legal voters in each precinct of the territory to be affected equal to 25 per cent of the votes cast in each precinct therein at the last preceding general election must sign the petition and remain thereon. (Ky. Stats., section 2554; Nall v. Tinsley, 107 Ky., 452; Tousey v. DeHuy, 62 S. W., 1118.)

2. A person who signs a petition for a local option election can withdraw therefrom at any time before the order is made. (Dutton v. Hanover, 42 Oh. St., 215; Hayes v. Jones, 27 Oh. St., 218; Simpson v. Comth., 97 S. W. 404, 30 Ky. Law Rep. 132; O'Neal, etc., v. Minary, etc., 30 Ky. Law Rep. 891, 101 S. W. 951.)

3. It is in the sound discretion of the county court to permit or deny the withdrawal of names from such petition, and its action can not be controlled or reviewed in a mandamus proceeding. (Colvin v. Finch, 87 S. W., 443; Comth. v. Boone, 82 Ky., 632; Dickens v. Cave Hill, 93 Ky., 385; Wright v. Baker, 94 Ky., 343; Leslie Co. v. Wooten, 115 Ky., 855.)

4. An election can not be ordered in a magisterial district which embraces a portion of a fourth class city, unless it is set ahead far enough to permit the city to obtain a separate election. (Gentry v. Peyton, 30 Ky. Law Rep., 894; Yates v. Nunnelly, 30 Ky. Law Rep. 984, 102 S. W. 292.)

5. General election defined. (Ky. Stats., section 2554; State v. King, 17 Mo., 511; Kenfield v. Irwin, 52 Cal., 164: State v. Cobb, 2 Kan., 32; Bond v. White, 8 Kan., 333; McIntyre v. Iliff, 68 Pac., 633.)

R. S. DINKLE and W. M. PRITCHARD for appellees.

There are three jurisdictional facts that the petitioners must establish by proof to the court after the petition is filed before they are entitled to the order for the election.

1. That the signatures to the petition are genuine.

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2. That the signers are residents of the precinct or territory to be affected.

3. That they are equal in number to 25 per cent of the vote cast in the precinct or territory to be affected at the last preceding general election.

AUTHORITIES CITED.

Ky. Stats., section 2554; Colvin, etc., v. Finch Ark. 87 S. W., 443; Early v. Raines, etc., 28 Ky. Law Rep., 416; Wyatt v. Ryan, 68 S. W., 134; O'Neal, etc., v. Minary, etc., 30 Ky. Law Rep. —.

OPINION OF THE COURT BY WM. ROGERS CLAY, COMMISSIONER—Reversing.

The Fifth magisterial district of Boyd county is composed of seven election precincts, five of which are within the corporate limits of the city of Ashland and embrace one-half of that city. Ashland is a city of the fourth class. The appellees filed a written petition with the county judge of Boyd county on the 25th day of February, and during the regular term of the Boyd county court, for the purpose of obtaining an order for an election in the Fifth magisterial district to determine whether or not spirituous, vinous, or malt liquors should be sold, bartered or loaned therein. This petition was signed by a number of voters equal to 25 per cent. of the votes cast in each of the said precincts at the preceding congressional election. At the next regular term of the Boyd county court, the regular judge was sick, and A. W. Starlin, one of the magistrates of said county, convened court and adjourned the hearing of the said petition until the following Thursday, at which time the regular judge was present and heard the application for said election. When the application came on for hearing, ten persons who had signed the petition came into court and filed a written statement requesting the

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withdrawal of their names from the petition. Six of the petitioners resided in precinct No. 12 in Ashland, and after their withdrawal from the petition the number of signers was not equal to 25 per cent. of the number of votes cast in that precinct at the preceding general election. There still remained, however, 25 per cent. of the voters of the entire district to be affected. Thereupon the county judge entered an order refusing to order an election. Thereupon the petitioners instituted this action in the Boyd circuit court for a writ of mandamus against the county judge, directing and compelling him to order an election. In their petition and amended petitions they set up substantially the foregoing facts. A demurrer to the petition as amended was overruled. Appellant then filed an answer, in which he stated that the matter came before him as judge, and he believed he had discretion as to whether or not he would permit the withdrawal of the names, and that he exercised such discretion according to his best judgment and in good faith. The answer also presents the further question: Which election should control, the election of 1906 for members of Congress alone, or the election of November, 1905, for State, county, district, and city officers? If the latter should control, there was less than 25 per cent. of the voters in each precinct signing the petition, even before any names had been withdrawn. To this answer appellees filed a demurrer. The case was then submitted, and the court entered judgment sustaining appellees' demurrer to appellant's answer, and awarding the writ of mandamus. From that judgment the county judge prosecutes this appeal.

The first question presented for our consideration is: Has a person who has signed a petition for a

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local option election the right to withdraw his name before the petition is acted upon? In the state of Ohio, where the power of ordering an election is vested in the city councils of certain municipalities, the Supreme Court, in Dutten v. Town of Hanover, 42 Ohio St. 215, laid down the following rule: "While such petition is under consideration, and before action thereon by the council, signers thereof may withdraw their names from such petition, and, if thereby the number of names is reduced below the requisite number, it is the duty of the council to refuse to order such election." The right of voters to withdraw their names from a petition for the granting of a license was sustained by this court in Simpson v. Commonwealth, 97 S. W. 404, 30 Ky. Law Rep. 132, wherein the court said: "It is true that ten of this number had previously petitioned the court to grant the license, but they had the right to change their minds and oppose the granting of the license, if they saw fit to do so, and the county judge was in error when he refused to consider their names upon the petition. He had no right to deny them the privilege of coming into court and stating to him that, although they had favored the granting of the license, they had upon reconsideration been opposed to it." The precise question was before this court in O'Neal v. Minary, 125 Ky. 571, 101 S. W. 951, 30 Ky. Law Rep. 891, and in discussing it the court said: "The county judge could not order an election on a petition signed by less than the statutory number of voters, and, although a voter had signed the petition, still he might, at any time before the petition was acted upon, withdraw his name, and, if this left less than the statutory number, no election could be ordered. The statute is not satisfied if

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a petition signed by a sufficient number of voters is filed with the judge. There must be a sufficient number of voters asking the calling of the election. No one is responsible for the cost of the proceeding but the petitioners. No one is required to make a deposit but the petitioners. If litigation ensues, no one may be responsible but the petitioners. It would therefore be a very harsh rule to say that a person who had signed such a petition cannot withdraw from it before it is accepted. Remonstrances against the granting of licenses are frequently withdrawn in county courts, although the writing has been filed with the county court, and there is no sound reason why the same rule should not apply to a petition for an election under the local option act before it is acted on by the county court." Counsel for appellees insist that the facts of the foregoing case and of the case at bar are so different that the rule above announced should not apply. The only difference between the two cases is that in the former all the petitioners withdrew, while in the latter only a small number withdrew. If, therefore, all have the right to withdraw, it necessarily follows that a smaller number embraced within the all should have the same right. But counsel for appellees contend with great earnestness that the proper rule is the one laid down by the Supreme Court of Arkansas in Colvin v. Finch, 75 Ark. 154, 87 S. W. 443, wherein that court held that, in the absence of facts showing fraud, duress, or imposition, no signer should be permitted to withdraw his name from a petition, upon the theory that he who voluntarily sets on foot a proceeding for the enforcement of a salutary police regulation in any community should not be permitted to capriciously undo his work. This rule,

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however, is not in harmony with our previous decisions, and we do not think the reason assigned for its application is sufficient to overcome the objections to the rule itself. A petition is but a formal written request or prayer for a certain thing to be done. He who signs it must do so voluntarily; otherwise he cannot be in the attitude of making a request. The signature of the petitioner is but evidence of the request or prayer. In the absence of anything to the contrary, the signature is conclusive. But when the signer appears in court and asks that his name be withdrawn, he indicates that he is no longer a petitioner. To hold that he is, is simply to make him a petitioner by a process of legal coercion which is contrary to the very spirit of a petition. We are therefore of the opinion that the trial court did not err in permitting the petitioners in this case to withdrawn their names from the petition.

The next question presented is whether a petition for a local option election in a magisterial district shall be signed by a number of voters in each precinct equal to 25 per cent. of the votes cast in each precinct, or by 25 per cent. of the voters of the entire district. The language of the statute (Ky. St. 1903, section 2554) is as follows: "Upon application by written petition, signed by a number of legal voters in each precinct of the territory to be affected, equal to twenty-five per cent. of the votes cast in each of said precincts at the last preceding general election, and when for town or city elections, the number of votes cast at the last city or town election, it shall be the duty of the judge of the county court in such county," etc. In interpreting this section, this court, in Nall v. Tinsley, 107 Ky. 452, 54 S. W. 190, 21 Ky. Law Rep. 1167, said: "A careful reading of the sec-

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tion shows that the first clause of it relates to legal voters in each precinct to be affected by the election. The territory referred to is a precinct or precincts which compose the political subdivision of a county. The second clause relates to city or town elections. When it is proposed to have an election in a city or a town, the petition must be signed by a number of legal voters equal to 25 per cent. of those cast at the last city or town election. When the election is proposed to be held in a territory comprising precincts, the petition should be signed by a number of voters equal to 25 per cent. of the votes cast in each of the precincts at the last preceding general election." In the case at bar, the territory to be affected is the Fifth magisterial district. This district comprises seven precincts. We are therefore of the opinion that the petition should have been signed by a number of voters in each precinct equal to 25 per cent. of the votes cast in each of the precincts at the last preceding general election, and that a petition signed by 25 per cent. of the voters of the entire district is not sufficient.

The next question involved is: What is meant by "the next preceding general election?" In view of the fact that nowhere in the Constitution or statutes is any attempt made to define a general election, the solution of the question is not altogether free from doubt. As there is usually greater interest, however, in local contests, and consequently a larger vote cast in elections for State or county officers, than in congressional elections, and the vote cast in the former a fairer test of the strength of the petition. we are of the opinion that the Legislature meant the next preceding general election at which officers for the

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State or county embracing the district in question were elected.

For the reason stated, judgment is reversed, and cause remanded, with directions to dismiss the petition.

Petition for rehearing by appellees overruled.

CASE 4.—ACTION BY C. W. BOSWELL AND ANOTHER AGAINST THE CITIZENS' SAVINGS BANK, ETC., TO RECOVER MONEY LOST IN STOCK GAMBLING.—October 31.

Citizen's Savings Bank v. Boswell, &c.

Appeal from McCracken Circuit Court.

W. M. REED, Circuit Judge.

Judgment for plaintiffs, defendant bank appeals—Affirmed.

1. Evidence—Evidence at Former Trial.—Where witnesses were not dead at the time of a second trial, and their evidence at the first trial did not consist of admissions made in the usual course of business and in connection with the transactions in controversy, had with them as officers of defendant bank, a transcript of their testimony at the former trial was inadmissible.
2. Appeal—Admission of Evidence—Prejudice.—Where two witnesses testified substantially as they had done on a former trial, defendant was not prejudiced by the court's erroneous admission of the report of their evidence on a former trial.
3. Same.—Where issue was taken on a garnishee's answer, and it appeared that it had on deposit belonging to the defendant, garnished by an improper name, more than enough to pay the amount sued for, the admission of evidence of a deposit

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made by such defendant after service of the garnishment was not prejudicial to the garnishee.

4. Garnishment—Liability of Garnishee—Instructions.—Where a bank was garnished in a suit in which the defendant was misnamed as the "O'Dell Commission Company," instead of the "O'Dell Company," and the bank denied that it had any funds of the "O'Dell Commission Company," an instruction that the defendant would be liable to the extent of the amount of the deposit of the "O'Dell Company," necessary to pay plaintiff's judgment, unless it was misled by the misnomer, was not objectionable as requiring the garnishee to look to a circuit court record to determine the party intended; there being no reference in the instruction or in the evidence to such record.

5. Trial—Instructions—Undue Prominence of Matters.—A garnishee, in an action against it, relied on a misnomer in the name of the debtor in the garnishee summons. Prior to the garnishment it had sent a telegram authorizing a non-resident bank to draw on it for money in its hands to the credit of the debtor. Held, That an instruction that if it remitted funds belonging to the debtor intended to be garnished, relying on the telegram, instead of being misled by the misnomer, the jury could not find for the garnishee because of such mistake, there was no ground for complaint on the part of the garnishee, as singling out a portion of the evidence, such evidence having no place in the case, and not to be considered by the jury in determining whether the garnishee was misled by the misnomer.

J. D. MACQUOT, attorney for appellant.

1. It is well settled that the opinion of the Court of Appeals, rendered on a former appeal, is the law of the case for all purposes.

2. Appellant was not required to examine the record after it had answered as garnishee.

3. The court erred in giving instruction "B" to the jury, because it gave undue prominence to portions of the testimony.

AUTHORITIES CITED.

Hopkins v. Adam Roth Grocery Co., 105 Ky., 357; Flood v. Pragroff, 79 Ky., 617; L. & N. R. R. Co. v. Banks, 17 Ky. Law Rep., 1065; Moran v. Higgins, 19 Ky. Law Rep., 456; Taulbee v. Moore, 21 Ky. Law Rep., 378; Old Times Dis. Co. v. Zehnder, 21

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Ky. Law Rep., 753; Travelers' Ins. Co. v. Clark, 22 Ky. Law Rep., 902; Boswell v. Citizens' Sav. Bank, 29 Ky. Law Rep., 988.

D. G. PARK, attorney for appellees.

AUTHORITIES CITED.

1. Questions involved: The $8,800 deposit after garnishment; Mrs. McMannon's testimony. (3 Wigmore on Evidence, section 1669; 1 Wigmore on Evidence, section 737.)

2. Instructions given by the court. (2 Ency. of Pleading and Practice, 235, 245, 288, 297; Blashfield on Instructions, sections 92, 93, 103; Tipton v. Triplett, 1 Met., 570; Hall v. Renfro, 3 Met., 51; Taylor v. Armstrong, 5 Ky. Law Rep., 251-2; Blashfield on Instructions, section 92; Travelers' Ins. Co. v. Clark, 115 Ky. 877-880-1-2, 25 Ky. Law Rep. 1233-4, 25 Ky. Law Rep. 111-112, 22 Ky. Law Rep. 902; L. & N. R. R. Co. v. Earl's Admr., 94 Ky., 374; Central Pass. Ry. Co. v. Chatterson, 14 Ky. Law Rep., 397-8; L. & N. R. R. Co. v. Morris' Admr., 14 Ky. Law Rep, 467-8; Sandy River Coal Co. v. Whitehouse Coal Co., 31 Ky. Law Rep., 374.)

3. Second appeal. (I. C. R. R. Co. v. Stith's Admx., 30 Ky. Law Rep., 532; Sandy River, etc., Co. v. Whitehouse, etc, Co., 31 Ky. Law Rep., 374.)

OPINION OF THE COURT BY WM. ROGERS CLAY—Commissioner—Affirming.

Appellees, C. W. Boswell and Z. T. Long, sued the O'Dell Commission Company and others in the Graves circuit court, on June 10, 1903, for money lost in stock gambling, and on June 11, 1903, an attachment was served on appellant, commanding it to hold money in its hands belonging to the O'Dell Commission Company. Appellant then had on deposit to the credit of the O'Dell Company the sum of $6,000, which amount it did not hold, but paid out on the same day on a check of the O'Dell Company drawn through a Cincinnati bank. Thereafter appellees amended their petition and alleged that the O'Dell Company was the true name of the garnishee. Prior

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to the time of this amendment appellant had answered that it owed defendant nothing. Subsequently this action was instituted against appellant, charging it with having failed to make a true disclosure of the money it owed to the principal defendant. At the first trial judgment was rendered in favor of the bank. On appeal that judgment was reversed by this court in an opinion which will be found in 123 Ky. 485, 96 S. W. 797, 29 Ky. Law Rep. 988. The case was remanded for the sole purpose of submitting to a jury the question whether or not appellant was misled by the use in the process of attachment of the name "the O'Dell Commission Company, instead of the O'Dell Company." This question was submitted to a jury, which returned a verdict in favor of appellees. From an order refusing a new trial, the Citizens' Savings Bank prosecutes this appeal.

The following errors are assigned: (1) That the stenographer who reported the testimony at the former trial was permitted to read to the jury the evidence given by Mr. Paxton, president, and Mr. Rudy, cashier, of the Citizens' Savings Bank. (2) That evidence of a deposit of $8,800 by the O'Dell Company after the service of the attachment was admitted. (3) That the instructions were erroneous.

As neither Mr. Paxton nor Mr. Rudy was dead at the time of the last trial, and as their evidence on the former trial did not consist of admissions made in the usual course of business, and in connection with and at the time of transactions then had with the bank through them as agents or officers, the admission of their former evidence was improper; but, as both Mr. Paxton and Mr. Rudy subsequently took the witness stand and testified substantially as they had done at the former trial, we do not think the

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action of the court in permitting the stenographer to detail their former evidence was in any way prejudicial to appellant.

Evidence of the deposit of $8,800 was not material one way or the other. The jury could not have been misled into believing that the attachment applied to that sum. The judgment was only for $3,261.83 and interest. There was already on deposit to the credit of the O'Dell Company the sum of $6,000. almost twice as much as the sum sued for, which fact was made known to the jury by the instructions of the court.

The instructions given by the court are as follows: "(A) The court instructs the jury that the judgments alleged in favor of plaintiffs were duly rendered against the O'Dell Company, and the attachments were duly sustained against its property, including the $6,000 on deposit in defendant bank in the name of the O'Dell Company; and the jury will find in their verdict for the plaintiffs, unless they believe from the evidence that the mistake in the use of the word 'Commission' in the name of the O'Dell Company, as set forth in the process of attachment served on the defendant, was under all the facts and circumstances in this case reasonably calculated to mislead, and did mislead, the president and cashier of the defendant, so that by reason thereof they did not know, or with reasonable diligence under such facts and circumstances could not ascertain, that the O'Dell Company's deposits were meant in such process to be attached, and by reason thereof in good faith failed to hold such deposits in its bank and possession for the benefit of plaintiffs under their attachments against such company, in which latter event, if they so believe, they will find for the de-

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fendant. (B) The Court instructs the jury that if they believe from the evidence that the defendant the Citizens' Savings Bank, through its president, W. F. Paxton, or cashier, R. Rudy, remitted the $6,000 to the Merchants' National Bank, of Cincinnati, Ohio, relying upon the telegram exhibited in evidence, instead of being misled into remitting it by reason of the mistake referred to in the other instruction herein, then they cannot find for defendant on account of such mistake."

Counsel for appellant contends that instruction A is erroneous, because it virtually required appellant to look at the record of Graves circuit court, when this court held in its former opinion that this was not necessary, and for the further reason that reasonable diligence was not defined by the court. We do not think this instruction is susceptible of the construction placed upon it by counsel for appellant. The record of the Graves circuit court is not referred to in the instruction or in the evidence. The evidence did show, however, that the business with the bank was first carried on in the name of the O'Dell Commission Company. The same person who was manager of that company then notified the bank that the O'Dell Commission Company had quit business, and that the business formerly conducted by that company would in future be carried on by the O'Dell Company. The bank knew that the same person was manager of both companies. Its officers were acquainted with the local representatives, who were the same for each concern. These were the facts and circumstances which the court told the jury to consider in determining whether or not appellant was misled by the mistake in name, and under this state of the record we are unable to see how the jury could

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have reached a different conclusion. Though the instruction is subject to criticism, we do not think it was calculated to prejudice, or did prejudice, the substantial rights of the appellant.

Instruction B is assailed on the ground that it singles out and gives undue prominence to a portion of the evidence. The evidence singled out, however, had no place in the case, and should not have been considered by the jury in determining the good faith of appellant. The effect of the instruction given was the same as if the court had peremptorily instructed the jury to disregard evidence that was not admissible, and appellant has no just cause of complaint that such testimony was eliminated from the consideration of the jury.

Perceiving no substantial error in the record, judgment is affirmed.

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CASE 5.—ACTION BY BESSIE SHEENY BY NEXT FRIEND AGAINST AMELIA HOLZHAUER FOR DAMAGES IN USING DEFECTIVE LEASED PREMISES.—October 31.

Holzhauer v. Sheeny

Appeal from Campbell Circuit Court.

A. S. BERRY, Circuit Judge.

Judgment for plaintiff, defendant appeals—Reversed.

1. Principal and Agent—Notice to Agent—Landlord and Tenant—Defective Premises—Injuries to Tenants.—Knowledge of an agent of defects in leased premises is knowledge of the landlord, so far as affects the latter's liability for injuries from such defects.
2. Landlord and Tenant—Defective Premises—Injury to Tenant—Liability of Landlord.—While the rules of caveat emptor applies to a contract of letting, and there is no implied covenant on the part of the landlord that the premises are fit for the purposes for which they are rented, or that they are in any particular condition, yet if the landlord, with knowledge that the premises are defective or dangerous and that such defect is not discoverable by the tenant by the use of ordinary care, rents such premises, concealing such knowledge, he is liable to the tenant for injuries sustained therefrom.
3. Same.—A landlord's failure to notify his tenant of defects in the premises does not render him liable for injuries therefrom, where the landlord does not acquire such knowledge until after the lease is made.
4. Evidence—Competency—Telephone Conversation.—A witness who is familiar with the voice of a person with whom he converses over the telephone may testify to admissions made in the conversation.
5. Same—Identity of Person Making Admission—Evidence—Sufficiency.—Evidence examined, and held sufficient to prove the

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identity of the person with whom witness testified he had a conversation by telephone.

6. Landlord and Tenant—Defective Premises—Injury to Tenant—Action—Evidence.—In an action against a landlord for personal injuries resulting from defective premises, evidence of admissions by defendant's agent, tending to show knowledge by him of the defective condition prior to the time of the injury, was inadmissible, in the absence of evidence that the agent had such knowledge prior to the time of renting.

7. Evidence—Admissions by Agent—Authority of Agent.—Admissions or statements of an agent, which, had they been made by the principal, could have been proved without being subject to the rule against hearsay evidence, can not be proved against his principal, unless they form a part of the res gestae.

8. Continuance—Grounds—Absence of Witness.—Civil Code Prac., section 554, allows the deposition of witness who is a practicing physician to be read, etc. Section 556 provides that, on an affidavit of a party that the testimony of a witness is important, etc., a court may in its discretion order the personal attendance of the witness to be coerced, although such witness may otherwise be exempt from personal attendance. Held, That the absence of a physician who had been subpoenaed as a witness was not ground for a continuance, where the party who subpoenaed him did not obtain an order of court for his personal attendance.

9. Same.—Civil Code Prac., section 315, provides that an affidavit for a continuance may be read as a deposition of an absent witness who has been summoned to appear, but who fails so to do, does not apply to witnesses whose appearance can not be coerced.

SAM E. ANDERSON, attorney for appellant.

1. The primary proposition of law is that the landlord is only liable, if, at the time she rented to the appellee, she knew the timbers upholding the floor were rotten, defective and dangerous, and suppressed her knowledge of its condition.

2. The petition is fatally defective in that it fails to state that defendant knew at the time of the demise that the timbers of the floor were rotten. Knowledge acquired after the demise does not raise any duty to repair, and therefore raises no liability for damages to the lessee.

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AUTHORITIES CITED.

Coke v. Gutkese, 80 Ky., 598; Franklin v. Tracy, 25 Ky. Law Rep., 1409; Doyle v. The Union Pacific R. R. Co., 147 U. S., 413; Hughes v. Cin., etc., R. R. Co., 91 Ky., 531; Louisville, etc., R. R. Co. v. Ellis' Admr., 97 Ky., 343; McLeod, Receiver, v. Ginther's Admr., 80 Ky., 399; East Tenn. Tel. Co. v. Simon's Admr., 99 Ky., 410; Roberts v. Burks, 16 Ky., 411; Reed v. Brooks, 13 Ky., 128.

A. M. CALDWELL, attorney for appellee.

We submit that upon this trial the appellee established three important facts:

1. That the closet which fell through with the appellee was rotten and utterly unsafe and unfit for use.

2. That the plaintiff, appellee, was seriously and painfully injured without the slightest fault on her part.

3. That appellant by her own confession and admission knew the condition of the closet before plaintiff was injured, and negligently failed to have it repaired or to give warning of its dangerous condition to her tenant the plaintiff, or any member of her family.

Considering the agony and distress of mind the plaintiff endured while suspended perpendicularly, head downward, into this vault, 12 feet in depth, looking death squarely in the face, until her mother, hearing her cries, came to her rescue, we insist that a verdict of $500 is not unreasonable.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

Appellant leased a tenement to the father of the infant appellee for the residence of his family. While using a privy closet on the premises, a defective seat, made insecure by rotting planks on which it rested, gave way with the infant appellee, precipitating her into the vault, and injuring her. In this suit by her prosecuted by her next friend, against the landlord for damages, there resulted a verdict and judgment in her favor. On the appeal, prosecuted by the land-

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lord, the following errors are assigned for reversal: (1) That the petition and the evidence failed to show a cause of action, in that it did not appear, either that the landlord had agreed to keep the demised premises in repair, or that she knew of their defective condition when the contract of renting was entered into. (2) That irrelevant testimony was admitted against the defendant, first, in allowing evidence of what her agent said out of court touching his knowledge of the defect; and, second, in admitting evidence as to an alleged conversation between plaintiff's attorney and appellant over a telephone touching her own knowledge on that subject. (3) That the affidavit filed by the plaintiff for a continuance was not sufficient ground for putting defendant upon election to suffer a continuance or allow the affidavit to be read as the deposition of the absent witness.

Taking up the question in the order stated, it does not appear when the contract of renting was made, but it does appear that it was some time before the accident to appellee. The petition charges that "the sills and timbers upholding the seat in said closet were defective, rotten, and dangerous, and that this fact was well known to the defendant, and her authorized agent in charge of said premises, long enough prior to the injuries received by plaintiff, as hereinafter set out, so that defendant might have remedied the same; that neither the plaintiff nor her father knew of the dangerous and defective condition of said closet or privy, nor could they by the exercise of ordinary care have discovered same, because of the character of its construction; that defendant and her said agent negligently failed to apprise plaintiff or her father of the dangerous condition of said closet or privy, and suppressed their knowledge

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thereof." The proof, to say the most of it, is no more explicit than the charge above quoted. Neither discloses when the defendant or her agent acquired their knowledge of the defects in the seat. From aught that appears, it may have been learned by them(if they knew it, in fact) after the contract of leasing was made, and after the tenant had entered upon the premises. The sufficiency of the plaintiff's case must therefore depend upon that state of facts. It will not be disputed that the knowledge of the agent who represented the landlord in making the lease is the equivalent of such knowledge on the part of the landlord herself, as affecting her liability. It is not deemed necessary, in view of the very recent utterances of this court on the subject of the landlord's liability respecting insecure tenements (Franklin v. Tracy, 117 Ky. 267, 25 Ky. Law Rep. 1409, 77 S. W. 1113, 78 S. W. 1112, 63 L. R. A. 649), and the well-nigh universality of the authorities elsewhere to the same effect, to more than state the prevailing principles of law on this subject.

The rule of caveat emptor applies to a contract of letting. The tenant must take the premises as he may find them. There is no implied covenant on the part of the landlord that they are fit for the purposes for which they are rented, or that they are in any particular condition; but there is this extension of the rule: If the landlord knows that the premises are defective or dangerous, and such defect is not discoverable by the tenant by ordinary care, and the landlord conceals or fails to disclose the dangerous condition, he is liable to the tenant, his family and servants, or even his guests, for injuries sustained therefrom. Coke v. Gutkese, 80 Ky. 598, 4 Ky. Law Rep. 545, 44 Am. Rep. 499; Franklin v. Tracy, supra,

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and authorities there reviewed. The qualification of the rule of law just noted rests upon the notion of deceit practiced by the landlord; for the general rule itself is founded upon a contract relation. The parties may by contract, as by warranty, or covenant to repair or keep in repair, regulate their liability upon a different basis; but, in the absence of special agreement, the implication of the law is that the tenant agrees to take the premises as they are, and the landlord guarantees nothing except the title—that is, peaceable possession. Each is expected to look out for himself; and if the premises are fallen into disrepair, unless it be stipulated otherwise in the contract, the tenant must make the needed repairs at his own expense, or use the premises at his own risk in their dilapidated state. The rent is supposed to be regulated upon this state of the matter. As the rule of caveat emptor implies, the tenant must look for himself. If, however, there is a latent and dangerous defect, which is not discoverable by observation, or by ordinary care, but which the landlord has knowledge of, it is deemed deceit for him not to disclose the fact to the tenant before the contract of renting is entered into. It is equivalent to positive misrepresentation to the tenant to induce him to enter into the contract. Therefore such knowledge, and implied misrepresentation, having misled the tenant into making a contract without warranty of condition, he will be protected against the consequences of the fraud practiced upon him. The circuit court, however, went beyond this. It was ruled at the trial that the knowledge of the landlord of the unsafe condition of the tenement, whenever obtained, must be communicated to the tenant, or the landlord will be liable. This position is wholly out of harmony with the rule:

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itself and the reason upon which it rests. Nor have we been cited, or found, any adjudged case which goes so far. As, in the absence of a covenant to repair, the tenant must make repairs himself, it would afford the tenant no protection in his contract for the landlord to tell him, after the tenant's liability for the rent had attached, that there was a defect in the premises; for the tenant could not then decline to enter into the contract, as he could have done if the matter had been disclosed to him at first, nor could he regulate the rent accordingly. He might at his own expense repair the defect, it is true; but that would not better his condition under his contract. The landlord's failure to then notify the tenant of the after-acquired knowledge of pre-existing defects, as in case of his knowledge of subsequent defects, might be unneighborly, but is not illegal,

2. As the case must be returned for another trial, where the pleadings and proof might be brought into harmony with the law as stated above, it becomes necessary to notice also the other errors assigned. There was an effort to show that the landlord had knowledge of the defective seat. A witness for plaintiff testified as follows: "Q. State your name and occupation. A. A. M. Caldwell, attorney-at-law. Q. What do you know about this case? A. Shortly after the accident happened I was employed as the attorney for the plaintiff, and I went to the telephone and got Mrs. Holzhauer's number, and called it up, and I explained to her— (Objection by defendant. Objection overruled. Defendant excepts.) She seemed to understand—(Defendant objects.) I explained to her about the accident, and she said: 'I don't believe it. I had that closet fixed. You will have to see my son Louis. He has the property in charge.' And

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then she hung up the receiver. (Motion to exclude overruled. Exception.)" Cross-examination: "Q. Have you ever spoken to or heard Mrs. Holzhauer talk? A. No, sir." The objection to this evidence is that the witness Caldwell did not sufficiently identify the person with whom he had his conversation, so as to admit her statements as admissions of the defendant against her interest. Obviously, the speaker whose conversation is introduced as evidence of an admission against his interest must be identified in some proper manner by evidence as the party to be charged in the suit, or the conversation is not receivable against him. If the witness was acquainted with the defendant's voice, his testimony that he recognized her voice is admissible as evidence, and it may constitute proof of her identity; or the identity might be proved otherwise. People v. McKane, 143 N. E. 455, 38 N. E. 950. In average experience the numbers and addresses contained in the telephone company's directory for public use are found sufficiently accurate to justify its substantial trustworthiness. When, therefore, a person so stated to live at the address, and bearing the same name as the party sought to be charged, is called for by the telephone at that number and address, and answers to the name, admitting the identity, it is to be accepted as the same evidence would be if the witness testifying had called in person and the ostensible owner had answered and admitted the identity. Globe Printing Co. v. Stahl, 23 Mo. App. 451. It is remembered that in the case in hand the witness does not say that he asked the party at the other end of the line who answered his call whether it was Mrs. Amelia Holzhauer, or that she asserted that it was; but the context of the conversation detailed serves to identify

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the defendant as the person who was speaking. Her calling the agent in charge her son Louis, her apparent acquaintance with the property in question, her assertion of ownership, her not questioning that plaintiff's family were her tenants in that property, her answering at the telephone number and address contained in the telephone company's directory, are all circumstances so in accord with what would have naturally resulted in such a conversation with the true owner as to be evidentiary of the identity of the person speaking as the person who actually lived at the given address, and who owned the tenement in dispute. The telephone is an instrument of such common—indeed, almost necessary—use in mercantile and social affairs of this day that to deny such evidence probative effect would be to seriously cripple the utility of this great modern instrument of communication. That which is generally accepted in the everyday affairs of life, and customarily in business transactions, as evidence, may safely be, and generally is, adopted by the courts, also, as evidence. The common sense and the common experience of mankind are safe tests of the reasonableness of rules regulating the trusthworthiness of information.

On the trial appellee offered evidence of admissions by Louis Holzhauer, the agent of appellant, tending to show knowledge by him of the insecure condition of the seat prior to the time of the injury to appellee. For the reasons already indicated above, it was error to have admitted this evidence. It did not show, and there was nothing to show, whether the alleged knowledge of the agent was prior to the time of renting or acquired subsequent thereto. Its relevancy must be tested by the weaker version, where it is susceptible of two constructions. The evidence was

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also inadmissible upon another ground. It was hearsay. It was to this effect: Within an hour or so after the accident Louis Holzhauer came upon the scene, and then stated in the presence of two witnesses testifying that he had intended to have the defect repaired. The inference deducible from this statement is that he had had knowledge of the defect prior to the injury. It was of course, a relevant fact that the agent had knowledge of the defect, provided such knowledge existed at the time of the rental. That fact might be proved in any competent manner. But admissions or statements of an agent, which, had they been made by the principal, could have been proved without being subject to the rule against hearsay evidence, cannot be proved against his principal, unless they form part of the res gestæ. The rule is thus stated by Story on Agency, sections 134-137, and approved by Greenleaf on Evidence, section 113: "Where the acts of the agent will bind the principal, then his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constitute part of the res gestæ." At the time when the admissions of the agent are claimed to have been made in this case, the contract of renting had been long since closed. His subsequent statement about what he then knew is on no higher plane than such statement by him about what he had done. In each instance it is his recital of the circumstances of a past event. The evidence was inadmissible in the light of the authority cited.

3. The final complaint is that the court erred in requiring the defendant to admit plaintiff's affidavit for continuance as the testimony of her absent witness or suffer a postponement of the case. The absent

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witness was her physician, who had been subpœnaed. The Civil Code exempts physicians from compulsory attendance as witnesses, unless expressly ordered by the court (section 556, Civ. Code Prac.), but allows their depositions to be used instead (section 554, Civ. Code). If the plaintiff desired the testimony of this witness, she ought to have taken his deposition, or had an order of court for his personal attendance, before the day of trial. It was not a good cause for delay that he was not present in person, although he had been subpœnaed (the court not having ordered his personal attendance), as the plaintiff had no right to expect his personal attendance when the law did not require it. The Code provides that the affidavit may be read as the deposition of an absent witness who has been summoned to appear, but fails (section 315, Civ. Code). That section does not apply to witnesses whose appearance cannot be coerced. Thurman v. Virgin, 18 B. Mon. 785.

For the reasons indicated, the judgment must be reversed. Cause remanded for a new trial under proceedings not inconsistent herewith.

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CASE 6.—MANDAMUS BY R. T. KENNON AGAINST ROBERT BLACKBURN, CLERK OF THE COUNTY COURT, TO COMPEL HIM TO ISSUE A LIQUOR LICENSE.—October 31.

Kennon v. Blackburn, Clerk

Appeal from Powell Circuit Court.

J. M. BENTON, Circuit Judge.

From a judgment dismissing his petition the plaintiff appeals—Reversed.

1. Intoxicating Liquors—Local Option—Mandamus to Compel Issuance of License—Collateral Attack.—A local option election resulting in favor of liquor selling, not having been attacked in the manner prescribed by the statute, can not be collaterally attacked in mandamus to compel the county clerk to issue a license to petitioner.
2. Same—Effect of Adoption.—Under Ky. Stats., 1903, section 2554, which provides for local option elections, Clay City, in Powell county, in 1896, voted for liquor selling, and Powell county, in 1905, voted against it. Ky. Stats., 1903, section 2560, provides that, even though the county votes against liquor selling, yet it shall be lawful to sell liquors in a city of the county, where, previous to the county election, the city voted for liquor selling, unless the majority of the city's voters at the county election voted against the sale. In January, 1907, Clay City issued a license to petitioner, but the Powell county clerk refused to issue him the State license. The record does not show how the voters of Clay City voted in the county election. Held, That the county election did not affect the right to sell liquor in Clay City, and hence petitioner was entitled to have the county clerk issue him a license, upon payment of the requisite fee.

HENRY WATSON, attorney for appellant.

The power to grant a license to retail spirituous, vinous and

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malt liquors, is vested in the city council of Clay City, and all the county clerk is required to do or know, is to know that the city council has passed on the question and issued a license, as they did in this case. (Koch v. Comth., 27 Ky. Law Rep., 122; Adams v. Stephens, 88 Ky., 443; Cooper, County Clerk, v. Shelton, 97 Ky., 282.)

JOHN D. ATKINSON, attorney for appellee.

Under the local option law, a city embraced within a county which has voted against the sale of liquor therein, is controlled in the matter by that vote, unless a separate election on the question is held in the city, resulting differently from the election held in the county. (Cooper, County Clerk, v. Shelton, 97 Ky., 282; Comth. v. King, 86 Ky., 436; Smith, etc., v. Patton, etc., 103 Ky., 444.)

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

In January, 1907, appellant made application to the board of council of Clay City, a city of the fifth class, for license to sell spirituous, vinous, and malt liquors by retail at his place of business in the city, and paid to the city treasurer the amount of the license tax demanded. Thereafter he presented to appellee, the county clerk of Powell county, the license issued to him by the city, and tendered the full amount of the license required by the State for the sale of such liquors, and demanded a license, which the clerk refused to issue. Thereupon he brought this suit, asking that a writ of mandamus issue against appellee, as clerk, directing him, upon the payment of the requisite license fee, to issue a license. The petition was dismissed, and he appeals.

A local option election was held in Clay City in September, 1896, and at this election a majority voted in favor of the sale of spirituous, vinous, and malt liquors. The result of the election was certified

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to by the canvassing board, and the certificate appears to have been entered on the records of the Powell county court at its October term. In January, 1905, an election was held in Powell county, and each precinct thereof, for the purpose of taking the sense of the legal voters upon the proposition whether or not spirituous, vinous, and malt liquors should be sold in Powell county. This election resulted in a majority of the votes being cast against the sale; and, proceeding upon the theory that the election in 1905 annulled the election in Clay City in 1896, the clerk refused to issue the license. In his answer, he assails the validity of the election held in 1896; but, as this election was not contested in the manner provided in the statute, it cannot be attacked in this collateral proceeding.

The only question to be determined is: What effect did the election held in Powell county in 1905 have upon the election held in Clay County alone in 1896? The statute in force in 1896 and 1905 provided in section 2554 of the Kentucky Statutes of 1903, that "upon application by petition signed by a number of the legal voters in each precinct in the territory to be affected * * * it shall be the duty of the county judge of such county at the next regular election thereof after receiving said petition to make an order on his order book directing an election to be held in the said county, city, town, district or precinct, as the case may be." Under authority of this section, the election in Clay City and in Powell county was held. Section 2560 provides that "if, at any election held for an entire county, it shall be found that a majority of the legal votes cast at said election are in favor of the sale, barter or loan of spirituous, vinous and malt liquors, then, in that event, it shall not be lawful

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to sell, barter or loan any such liquors in any portion of said county where such sale, barter or loan has been prohibited by special act of the Legislature; but such act shall continue in force as if no election had been held; nor shall it be lawful to sell, barter or loan any such liquors in any city, town, district, or precinct in said county where, previous to said election, such city, town, district or precinct had already, by vote, prohibited such sale, barter or loan, unless a majority of those voting in a precinct or precincts, town or towns, city or cities, in which the sale, loan or barter shall be prohibited, vote in favor of such sale, loan or barter, then in the precincts, towns or cities so voting, such sale, loan or barter shall no longer be prohibited; and if, at any election held for the county at large, it shall be found that a majority of the legal votes cast at said election are against the sale, barter or loan of spirituous, vinous and malt liquors therein, yet it shall be lawful to sell such liquors in any city, town, district or precinct in said county where, previous to such election, any city, town, district or precinct had already, by vote, voted in favor thereof, unless a majority of the legal voters voting in such city, town, district or precinct at such election vote against the sale, barter or loan thereof, in which event it shall no longer be continued."

Under this section, at an election held for the county at large, the fact that a majority of the legal voters in the county and in each precinct thereof vote against the sale of liquor does not affect the status of a city within the county that had previous to the county election voted in favor of the sale of such liquors ,unless at the election held for the entire county a majority of the legal voters voting in such

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city voted against the sale. There is nothing in this record to show how the voters in Clay City voted upon this question at the county election. Therefore, under the plain reading of the statute, the election held in the county did not affect the right to sell liquor in Clay City, authorized by the election held therein in 1896, and appellant was entitled to the relief prayed for.

Wherefore the judgment is reversed, with directions to proceed in conformity with this opinion.

CASE 7.—ACTION BY THE CITY OF GEORGETOWN AGAINST E. M. HAMBRICK TO ENJOIN HER FROM BUILDING A SIDEWALK.—November 1.

City of Georgetown v. Hambrick

127 43
f135 134

Appeal from Scott Circuit Court.

R. L. STOUT, Circuit Judge.

From a judgment of dismissal the plaintiff appeals —Affirmed.

1. Dedication—Streets—Use—Purpose.—Where a street was dedicated for ordinary street purposes, it will be presumed that the parties contemplated it should be used in the usual way, with a carriage way in the center and sidewalks on the side.
2. Municipal Corporations—Streets—Regulation.—While a city council, under its power to regulate and control streets, may fix the width of the carriage way or the sidewalks within reasonable limits, it can not say that the whole street shall be used as a carriage way, and that no part shall be used for sidewalks.

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3. Same—Rights of Abutting Owners.—Where a city council acts arbitrarily in refusing to allow a reasonable space in a street for sidewalks, the abutting owner may compel the setting aside of a reasonable space for sidewalks.
4. Same—Construction of Walks.—In 1888 defendant's husband owned property on a city street in front of which he put down a curb and built for a part of the front a sidewalk four feet wide. The street was in the outskirts of the town and was 30 feet wide. The city council had not by ordinance defined the space in the street to be used as a carriage way or for sidewalk. Defendant in 1906 constructed a pavement four feet wide within the curb for a sidewalk for the entire front of the property. Held, That the city had no right to restrain the construction of such walk.
5. Same—Widening Streets—Remedy of City.—Where a street is too narrow for the increasing public needs if sidewalks are built in it, the city's remedy is to widen the street by taking property for that purpose.

JAMES B. FINNELL, JR., attorney for appellant.

POINTS AND AUTHORITIES CITED.

1. The city council alone has power to cause public ways within the city to be improved, and to determine the extent and character of the improvements, and whether any shall be made at any particular place. (Ky. Stats., sections 3560, 3563, 3568.)

2. Appellee has acquired no rights against the city by lapse of time. (Ky. Stats., section 2546.)

3. City council can not delegate its discretionary power (Advance sheets of Ky. Law Rep., vol. 29, p. 1013, Dec. 1, 1908; City of Bowling Green v. Gaines.)

4. No acceptance of the pavements in controversy should be presumed unless it is clearly shown that they were beneficial to the city and would impose no burdens upon it. (Foot note in Am. and Eng. Ency. of Law, 2 Ed., p. 45, referring to Mann v. Elgin, 24 Ill. App., 419; Willey v. ePople, 36 Ill. App., 612.)

B. M. LEE, attorney for appellee.

The proceedings of the city council are public records, and it must speak only by its records, therefore the best judgment of the best council can avail nothing unless some record is made of the proceedings. There is no pretense here that any ordinance or resolution was ever passed by the council in regard to the

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pavement in question. The law was against the plaintiff, and for this reason the demurrer to the petition should have been sustained.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

About the year 1888, appellee's husband, who then owned property on the south side of Bourbon street, in Georgetown, between Hamilton and Mulberry, put down a curb and built for part of the front a sidewalk four feet wide. The street was in the outskirts of the town and was 30 feet wide. He devised the property to appellee, and she began in the year 1906 the construction of a pavement four feet wide within the curb for the entire front of the property. The city council notified her not to build it, and, she declining to recognize the notice, it filed this suit to enjoin her building the sidewalk. On final hearing the circuit court dismissed the proceeding, and the city appeals.

The street was dedicated for ordinary street purposes, and it must be presumed the parties contemplated it was to be used in the usual way. In ordinary city streets there is a carriage way in the center and sidewalks on the side. The sidewalks is as necessary as the carriage way, and both are equally within the contemplation of the parties in the dedication. The city council, under its power to regulate and control the streets, may fix the width of the carriage way or the sidewalks, or determine how much space shall be given to each; but it cannot say that the whole street shall be used as a carriage way, and that no part of it shall be used as a sidewalk. The owner of the abutting property is entitled to have a reasonable space for sidewalk, and the council can-

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not act arbitrarily. It can determine what is reasonable space, but in so doing it must exercise a fair judgment. If it fails to give a reasonable space for sidewalks, and the proof is such as to show arbitrariness, the property holder is not without remedy.

In this case the city council has not by ordinance defined the space in the street to be used as a carriage way or what may be used as a sidewalk. It does not appear that the sidewalk the defendant is constructing unreasonably interferes with the use of the street. It is within the curb put there in 1888 and is only four feet wde. There is therefore no ground for interference by the chancellor. If, as the evidence tends to show, the street is too narrow for the increasing public needs if sidewalks are built in it, the remedy of the city is to widen the street by condemning property for this purpose if it cannot agree with the owners as to the matter.

Judgment affirmed.

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CASE 8.—PROCEEDINGS ON AN INDICTMENT AGAINST H. T. DUNCAN FOR LIBEL.—November 1.

127 47
f133 666

Commonwealth v. Duncan

Appeal from Fayette Circuit Court.

WATTS PARKER, Circuit Judge.

From a judgment sustaining a demurrer to the indictment the Commonwealth appeals—Reversed.

1. Libel—Criminal Responsibility—Sufficiency of Indictment.—An indictment for libel, charging that the publication was made of and concerning the party libeled, and then setting out the publication, is sufficient under Criminal Code Prac., section 132, providing that "an indictment for libel need not set forth any extrinsic facts for the purpose of showing the application, to the party libeled, of the defamatory matter, but it is sufficient to state generally that the same was published concerning him."
2. Same—Nature of Libel.—An article calling attention to the plunderers of the county, and speaking of one as the holder of many offices, who has been industriously at work for four years correcting unsatisfactory entries and making new ones, supplying missing vouchers and putting everything in "apple-pie" order for investigation, and who will elucidate explain, modify, or magnify the numerous entries and vouchers which are to be submitted to the grand jury, is manifestly calculated to create a disturbance of the peace, and to bring the official into contempt, and is therefore libelous as to him.
3. Same—Privileged Communications.—Where one while the grand jury is in session, publishes a libelous article against an officer, whose acts are to be investigated, and addresses it to the grand jury, the publication is not thereby privileged, and is as libelous against the officer as though it were addressed to the public at large.
4. Same—Certainty in Indictment.—An indictment, charging that the defendant published "a certain false, scandalous

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and malicious article for publication, containing words and sentences of and concerning L. E. Pearce, as follows," and then setting out the entire article, is sufficiently definite to show that the statements contained in the article are charged as libelous of Pearce.

N. B. HAYS, Attorney General, and C. H. MORRIS for appellant.

Where the words in a particular case are ambiguous and are fairly capable of two meanings, one harmless and the other defamatory, according to the occasion upon which they were used, or the surrounding circumstances with reference to which they are to be construed, the question as to the meaning of the words and the sense in which they were used, is one for the jury; and in a criminal prosecution where it is doubtful whether the writing contains matter which is libelous per se, the question is one of fact for the jury, rather than a question of law for the court. (A. & E. Ency. of Law, 2 Ed., vol. 28, p. 993.)

SAM'L M. WILSON, counsel for appellee.

POINTS AND AUTHORITIES.

1. The facts stated do not constitute a public offense. (Am. & Eng. Ency. of Law, 2d Ed., title "Libel and Slander;" Criminal Code, section 132; Criminal Code, sections 122 and 124; Ency. of Pl. & Pr., vol. 13, art. "Libel & Slander.")

2. The publication complained of was absolutely privileged, and such privilege constitutes a complete bar to this prosecution. (Criminal Code,, section 102; Shields v. Comth., 21 Ky. Law Rep., 1588; Beiser v. Scripps-McRae Pub. Co., 113 Ky., 383; Bunton v. Worley, 4 Bibb., 38; Grimes v. Coyle, 6 B. Monroe, 301; Townshend on Slander and Libel, 2d Ed., section 220.)

3. Remarks on brief for appellant. (Criminal Code, section 132; Von Ingen v. Mail & Express Pub. Co., 35 N. Y. Supp., 838.)

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

H. T. Duncan was indicted in the Fayette circuit court for libel. The court sustained a demurrer to the indictment, and the Commonwealth appeals.

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The indictment is in these words:

"The grand jury of Fayette county, in the name and by the authority of the Commonwealth of Kentucky, accuse H. T. Duncan of the offense of libel, committed as follows, viz.: That said H. T. Duncan on the 12th day of June, 1904, and within one year before the finding of this indictment, in the county aforesaid, did unlawfully, wilfully and maliciously write, compose, sign and publish and cause to be published in the Lexington Leader, a daily paper published in Lexington, Ky., and of general circulation in Fayette county, of and concerning one L. E. Pearce, who was then and there clerk of the quarterly court of Fayette county, a certain false and malicious article of publication containing words and sentences of and concerning said L. E. Pearce, as follows, to-wit:

" 'A Faithful Friend on the Grand Jury.

" 'Col. Duncan Addresses an Open Letter to Judge Parker Suggesting the Impropriety of Requiring a Former Employe and Star Witness of the Fiscal Court to Sit on a Jury Charged with the Investigation of Its Transactions.

" 'Lexington, Ky., June 11, 1904.

" 'Messrs. Harvey Bain, Foreman; Leonard Tingle, W. A. Cannon, Oliver Redd, J. W. Harp, M. D. Dunleavy, J. R. Williamson, John P. Innis, Israel Worsham, L. P. Gumm, H. G. Smith and George W. Headley, Members of the Grand Jury—Gentlemen: I have heard a rumor that the county judge was before you on Monday last and in a full and frank manner told you that the county books, the vouchers and checks showing all expenditures during his term of

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office were open for your examination at any time you wished—that you would find them straight and all right and every dollar accounted for. I could not ascertain the truth of this rumor, because everything that is done in regard to county affairs is under the cover of profound secrecy, but I presume it is true. Did he promise that his "Fidus Achates"—that ubiquitous county official who is sometimes "County Auditor," sometimes "County Book-keeper," sometimes "Clerk of the Quarterly Court" and "Instructor for the new City Auditor"—would accompany the books and elucidate, explain, modify or magnify the numerous entries and vouchers which are to be submitted? Did he explain that this holder of many offices had been industriously at work for four years bringing order out of chaos, correcting unsatisfactory entries and making new ones, supplying missing vouchers and putting everything in "apple-pie" order for investigation?

" 'There is also a rumor that the judge offered to have an expert investigation made under orders of the fiscal court. Don't you know that an investigation of this kind would be absolute folly? If that distinguished body of men constituting the fiscal court are to manipulate an investigation—in other words, investigate themselves—save the cost and stick to the Pearce report, declare the court vindicated and indict me for libeling the honest plunderers of the county.

" 'Every movement that I make in this matter shall be open and free to the public, and free from concealment just as the city books and records were, when under inspiration from the courthouse patriots, Mr. Charles Merriweather began his investigation into the fiscal affairs, books and records of the city

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of Lexington. The individuals backing the inquisition into city affairs were willing to guarantee the expense in the event of the general council refusing to pay them. I will be equally liberal and will guarantee Mr. Merriweather's expenses in making an investigation into the county books and business.

" 'I append a letter to Judge Parker which is self-explanatory.

" 'Respectively, H. T. Duncan.'

"Said article is filed herewith as part hereof, marked 'Exhibit A.' All of which said statements contained in said article above mentioned made of and concerning L. E. Pearce were false, wilful and malicious, and the said H. T. Duncan well knew at the time he so wrote, composed, signed and published said article or publication that all of the aforesaid statements made of and concerning the said L. E. Pearce and contained in said article or publication, aforesaid, were false and malicious; but the said H. T. Duncan composed, wrote, signed and published said article or publication containing the statements aforesaid of and concerning the said L. E. Pearce, and meaning thereby to charge him with the crime of changing and falsifying the public records of Fayette county, and with dishonesty and lack of integrity as a bookkeeper, for the wicked and malicious purpose and with intent to injure his good name and fame as a public officer and man of business and as a citizen of the Commonwealth, and to expose him to public suspicion, hatred, contempt and loss of reputation, against the peace and dignity of the Commonwealth of Kentucky."

It is insisted that the indictment is insufficient for the following reasons: (1) That it fails to show that any of the things contained in the publication applied

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to L. E. Pearce, and that there is no inducement or statement of extrinsic facts; (2) that the publication is not libelous as to Pearce; (3) that the indictment shows upon its face that the publication was privileged; (4) that the indictment is indefinite, in this, that it does not show what statements contained in the publication are charged as libelous of Pearce. These objections will be considered in the order stated.

1. Section 132, Cr. Code Prac., is as follows: "An indictment for libel need not set forth any extrinsic facts, for the purpose of showing the application, to the party libeled, of the defamatory matter; but it is sufficient to state generally that the same was published concerning him." The indictment charges that the publication was made of and concerning L. E. Pearce. This is sufficient, as under the statute it is unnecessary to set forth in the indictment any extrinsic facts for the purpose of showing the application of the defamatory matter to the party libeled. The extrinsic facts showing the application of the defamatory matter may be proved by the Commonwealth on the trial, without setting them forth in the indictment, and the application of the matter is a question for the jury.

2. The rule as to what is libelous is thus stated in 2 Roberson, Crim. Law, 586: "Libel is an offense at common law, and is defined to be any false and malicious publication which tends to blacken the memory of one who is dead, or to degrade or injure one who is alive, or to bring him into contempt, hatred or ridicule, or which accuses him of any crime punishable by law, or of any act odious and disgraceful to society." In 2 Bishop on Crim. Law, section 907, the offense is defined in these words: "The offense

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of libel is founded on the doctrine of attempt. It is any representation in writing, or by pictures, effigies, or the like, calculated to create disturbances of the peace, to corrupt the public morals, or to lead to any act which, when done, is indictable." The publication in question certainly tended to bring Pearce into contempt and ridicule. It was manifestly calculated to create a disturbance of the public peace. The article speaks of the plunderers of the county. It speaks of Pearce as the holder of many offices, who has been industriously at work for four years correcting unsatisfactory entries and making new ones, supplying missing vouchers, and putting everything in apple-pie order for investigation. It charges that he will elucidate, explain, modify, or magnify the numerous entries and vouchers which are to be submitted. If such charges are not calculated to bring an official into contempt, it is hard to understand what would.

3. Judicial proceedings are privileged. The testimony of a witness even in a preliminary examination was held privileged in Beiser v. Scripps McRae Publishing Co., 113 Ky. 383, 24 Ky. Law Rep. 259, 68 S. W. 457, on the ground that, where the law imposes a duty upon a citizen, he cannot be held responsible in damages as for slander or libel for the testimony that he gives. Upon the same principle, if the witness testifies before the grand jury, his statements would be privileged. The law protects testimony given before the grand jury by declaring that it shall not be divulged. But Duncan did not testify before the grand jury. Had he testified before the grand jury, nobody could have known what he said but the grand jurors or the Commonwealth attorney, and they were required to keep it secret. When, for the

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purpose of publicity, he published his communication in a daily newspaper, he was discharging no duty which the law imposed upon him so far as the grand jury was concerned; and the fact that he addressed his communication to the members of the grand jury altered in no way its legal character. If the communication would be libelous when addressed to the public at large, it is equally libelous when addressed to persons who are styled grand jurors. The law does not tolerate this manner of bringing matters to the attention of the grand jury, and he who libels another cannot escape responsibility for his act by addressing his publication to the grand jury or to some public official. Were this the rule, prosecutions for libel could always be defeated. See Shields v. Commonwealth, 55 S. W. 881, 21 Ky. Law Rep. 1588.

4. We cannot see that the indictment lacks certainty. It charges that the defendant published "a certain false, scandalous and malicious article or publication containing words and sentences of and concerning L. E. Pearce, as follows," and then the entire article is copied. This is a charge that the words and sentences contained in the article were published of and concerning L. E. Pearce. If it shall turn out on the trial that certain parts of the article do not refer to Pearce, the court will regulate the matter by its instructions to the jury. If the Commonwealth does not prove on the trial that all the statements were made of and concerning Pearce, but does prove that some of them were, and the statements so proved are libelous, the court will, by its instructions, submit the case to the jury on these matters.

Judgment reversed, and cause remanded to the circuit court, with directions to overrule the demurrer to the indictment.

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CASE 9.—ACTION BY WILLIAM F. SIMRALL'S ADM'R AGAINST THE LOUISVILLE & NASHVILLE R. R. CO. FOR DAMAGES FOR CAUSING THE DEATH OF PLAINTIFF'S INTESTATE.—November 1.

Louisville & N. R. R. Co. v. Simrall's Admr.

Appeal from Shelby Circuit Court.

R. F. PEAKE, Circuit Judge.

Judgment for plaintiff, defendant appeals—Affirmed.

1. Death—Cause—Evidence.—Intestate, a railroad station agent, was struck, on July 25, 1901, by a car door which fell on him from one of defendant's cars standing or moving on a side track as intestate was passing it in the course of his business. Intestate was knocked down, and his head and hip badly injured. He continued in defendant's service until January or February, 1902, when he was stricken with pneumonia or typhoid fever, after which his health rapidly failed, and on October 14, 1902, he was declared a lunatic and sent to an asylum, where he died September 12, 1905. Held, That his death was reasonably attributable to his injuries; defendant having offered no testimony in support of any other theory.
2. Master and Servant—Death of Servant—Negligence.—Where a station agent was struck, and received injuries from which he died, by the fall of a defective car door as the agent was passing in the course of his duties, the dangerous condition of the door was sufficient evidence of negligence on the part of the railroad company.
3. Damages—Personal Injuries.—If a person injured by a railroad company sues for damages for the injury within a year, as he is required to do by Ky. Stats., 1903, section 2516, he may recover for physical and mental suffering and impairment of his ability to earn money, not only up to the time of the trial, but for such as may reasonably be expected to result to him from defendant's negligence in the future.

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4. Death—Action by Administrator.—If a person injured by a railroad company die of the injuries, and his administrator sues for the injury within a year after the infliction thereof, as provided by Ky. Stats., 1903, section 2516, he may recover for intestate's mental and physical suffering, loss of time, and surgical bills to the time of intestate's death.
5. Same—Measure of Damages.—In an action for wrongful death, intestate's administrator can not recover for his intestate's physical or mental suffering, or mere impairment of his power to earn money; the measure of damages being limited to such a sum as will compensate intestate's estate for the destruction of his power to earn money.
6. Limitation of Actions—Personal Injuries—Accrual of Cause of Action—A cause of action against a railroad company for injuries to a servant, brought by the servant's administrator, accrued on the infliction of the injury, from which time the one-year statute of limitation (Ky. Stats., 1903, section 2516) began to run.
7. Death—Cause of Action—Accrual.—An action for a wrongful death, created by Constitution section 241, and Ky. Stats., section 6, does not accrue until the death of the person injured, regardless of the date of the injury.
8. Same—Limitations.—Act 1854 (1 Acts 1853-54, p. 175, ch. 964), section 4, providing that actions for wrongful death shall be commenced within one year from the time of such death, was not changed by the phraseology adopted in embodying it in Ky. Stats., 1903, section 2516, declaring that an action for injury to the person or to a servant by railroads shall be commenced within one year next after the cause of action accrued, and not thereafter, under the rule that, where a law has been settled, a mere change of phraseology in a revision will not be construed to change the law, unless such phraseology purported to work a change.
9. Same—Damages—Instructions—In an action for wrongful death, an instruction that, if the jury found for plaintiff, they should find in such a sum as would reasonably compensate intestate's estate for the destruction of intestate's power to earn money, not exceeding the amount claimed in the petition, and authorizing the jury to consider intestate's age, capacity to earn money, and probable duration of life, was not objectionable for failure to limit the destruction of his earning capacity to such as was caused by his death.
10. Trial—Instructions—Requests to Charge.—Unless a litigant offers additional instructions in lieu of instructions given

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which were correct in themselves, he can not object that the instructions were inadequate.

WILLIS & TODD, and EDWARD W. HINES for appellant.

BENJAMIN D. WARFIELD of counsel.

POINTS AND CITATIONS.

1. The trial court erred in sustaining plaintiff's demurrer to the defendant's pleas of the statute of limitations.

(a) No right of action exists for causing the death of a person where no right of action for the injury causing the death exists at the time the death occurs, as neither section 241 of the Constitution of Kentucky nor section 6 of the Ky. Stats. was intended to give a right of action for causing the death of a person unless a right of action for the injury existed at the time of the death. (Hansford v. Payne, 11 Bush, 380; Connor's Admr. v. Paul, 12 Bush, 144; Hackett, Admr., v. Louisville, etc., R. Co., 95 Ky., 236; L. & N. R. Co. v. McElwain, 98 Ky., 700; Donahue v. Drexler, 82 Ky., 157; Henderson's Admr. v. Ky. Cent. R. Co., 86 Ky., 389; Jordan's Admr. v. Cincinnati, etc., R. Co., 89 Ky., 40; Wright v. Wood's Admr., 96 Ky., 56; East Tenn. Tel. Co. v. Simms' Admr., 18 Ky. Law Rep., 761; Passamaneck's Admr. v. Louisville Ry. Co., 98 Ky., 195; Clark's Admr. v. L. & N. R. Co., 101 Ky., 34; Southern Bell Telephone & Telegraph C&o. v. Cassin, 111 Ga. 575, 50 L. R. A. 694; Heck v. Ohio & M. Ry. Co., 132 Ind., 507; Lubrano v. Atlantic Mills (R. I.), 34 L. R. A., 797; Canadian Pac. R. Co. v. Robinson (Canada Supreme Court), 54 Am. & Eng. R. Cases, 49. Same case on appeal, Appeal Cases (1892), 481.)

(b) The policy of the law is to limit to a short period after the injury the time for bringing actions for personal injuries, whether the injury resulted in death or not. (Ky. Stats., section 2516; Carden, Admr., v. L. & N. R. Co., 101 Ky., 113· L. & N. R. Co. v. Sanders, etc., 86 Ky., 259; L. & N. R. Co. v. Brantley's Admr., 106 Ky., 849; Van Vactor's Admr. v. L. & N. R. Co., 112 Ky., 445; Lansell v. Brashear, 3 Mon., 330; Ellis v. Kelso, 18 B. M., 296; Wood on Limitations, sections 5 and 179; 21 Am. & Eng. Ency. of Law, p. 93.)

2. The instruction as to measure of damages was erroneous. (L. & N. R. Co. v. Millet's Admr., 20 Ky. Law Rep., 533; C. & O. R. Co. v. Lang's Admr., 100 Ky., 221; L. & N. R Co. v. Graham's Admr., 98 Ky., 688.)

3. If the instruction as to measure of damages be so interpreted as to make it a correct statement of the law, then it was

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disregarded by the jury, and the verdict is contrary to both the law and the evidence.

4. The injuries complained of were not the proximate cause of the death of plaintiff's intestate, and for that reason also the verdict is not supported by the evidence. (Scheffer v. Washington, etc., R. Co., 105 U. S., 294.)

P. J. BEARD, WM. SCOTT and J. C. BECKHAM & SON, attorneys for appellee.

After all these years of judicial expressions and of legislative intent, we must take it as the settled policy in this State, that the cause of action for the death under the provision of section 241 of the Constitution, and section 6 of the statutes, accrues at the time of the death, and that the statute of limitation commences to run from that date.

In this case the injury occurred in July, 1901, the death occurred September 12, 1905; the administrator qualified September 22, 1905; the suit was instituted September 27, 1905; these facts are admitted by the pleadings. The statute of limitation was interposed. A demurrer by plaintiff was properly sustained to this plea.

OPINION OF THE COURT BY JUDGE SETTLE — Affirming.

This is an appeal from a judgment of the Shelby circuit court upon a verdict awarding appellee, W. C. Haynes, administrator of the estate of Wm. F. Simrall, deceased, $5,000 damages for the death of the latter, alleged to have been caused by the negligence of appellant, Louisville & Nashville Railroad Company. The intestate on July 25, 1901, was station agent for appellant at Scott's Station, in Shelby county, Ky. and was that day injured by being struck by a car door, which fell upon him from one of appellant's cars, standing or moving on a side track at Scott's Station, as he was passing it to deliver a waybill to the conductor of a freight train then about to leave the station. The intestate was knocked down by

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the falling car door, and his head and hip badly injured. Notwithstanding his injuries and consequent ill health, he continued in appellant's service until January or February, 1902, when he became ill with pneumonia or typhoid fever, after which he rapidly failed in health, and on October 14, 1902 was by verdict of a jury declared a lunatic and sent to the insane asylum at Lakeland, where he died September 12, 1905. The administrator qualified September 22d, and on September 27, 1905, instituted this action. Appellant by its answer denied the negligence complained of in the petition, alleged contributory negligence on the part of the intestate, and pleaded the statute of limitations; averring that more than one year elapsed between the infliction of the intestate's injuries and his death, and also that more than one year elapsed after the injuries were inflicted before the petition was filed. The lower court sustained a demurrer to the pleas of the statute of limitations, to which appellant excepted.

We think the evidence fairly supports the conclusion that the death of the intestate can with reasonable certainty be attributed to the injuries he received from the falling upon him of the car door, and appellant offered no testimony in support of any other theory as to the cause of his death. We are also of opinion that the evidence easily leads to the further conclusion that the injuries he sustained resulted from appellant's negligence. Indeed, no other evidence of such negligence was needed than that furnished by the dangerous condition of the car door, which must have been known to appellant's servants in charge of the train before it fell upon Simrall, or could, by the use of ordinary care, have been discovered by them, either before or after the arrival of

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the train at Scott's Station and before his injuries were received. In other words, the evidence was sufficient to authorize the finding of the jury that the death of appellee's intestate was the natural and proximate result of the negligence of appellant complained of.

It is strongly insisted for appellant that the court erred in sustaining appellee's demurrer to its pleas of the statute of limitations; it being the contention of counsel that no right of action exists for negligently causing the death of a person where no right of action for the injury causing the death exists at the time the death occurs, and, further, that neither section 241 of the Constitution of Kentucky nor section 6 of the Kentucky Statutes of 1903 was intended to give a right of action for causing the death of a person, unless a right of action for the injury existed at the time of the death. The argument advanced by learned counsel for appellant is that, as section 2516, Ky. Stats. 1903, which provides: "An action for an injury to the person of the plaintiff, or his wife, child, ward, apprentice, or servant, or for injuries to person, cattle, or stock, by railroads or any company or corporation * * * shall be commenced within one year next after the cause of action accrued and not thereafter"—applies to actions for injuries resulting in death, as well as those which do not result in death, the statute runs in each case from the time the injury was inflicted. It is further argued that the starting point is the same in each case, and that if, in the case of an injury subsequently resulting in the loss of a leg, the statute runs from the date of the original injury, and not from the loss of the leg, so, in the case of an injury subsequently resulting in death, the statute runs from the date of the original

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injury, and not from the death. It is also urged that any other construction of the statute than that contended for by appellant would lead to injustice and oppression, for the reason that if an administrator may maintain an action for causing the death of his intestate, where the death did not result until the lapse of 10 or 15 years from the time the injury was inflicted, then he may recover, although his intestate could not do so, if living, for the injuries received, and that, too, very probably after many of the witnesses have died or disappeared, and after the circumstances surrounding the infliction of the injury have faded from the memories of those by whom it was witnessed.

Though plausible, the foregoing argument is unsound. Hardships may result in exceptional cases from the application of any statute or legal principle, however salutary the operation of either in general. There is only a seeming analogy in the cases instanced by counsel. If the person injured sues for the injuries sustained, while he must do so within the year, he may not only recover for the physical and mental suffering and impairment of his ability to earn money experienced up to the time of the trial, from the injuries received caused by the negligence of the defendant, but also for such of either or both as may reasonably be expected to result to him therefrom in the future. If the person injured, die of the injuries, his administrator, by suing within a year of the infliction of the injuries, may recover for his mental and physical suffering, loss of time, and surgical bills down to the time of the death. On the other hand, if the administrator sues to recover for the death of his intestate, caused by the negligence of another, the measure of damages is wholly

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different; for in the latter case there can be no recovery for the physical or mental suffering of his intestate, or the mere impairment of his power to earn money, but the recovery is for the death of the intestate alone, and is limited to such a sum as will compensate his estate for the destruction of his power to earn money. In the first case the cause of action is asserted by the person injured, or his administrator, and it arises out of and is for the injury received. It therefore accrues from and at the time of the infliction of the injury; hence the statute then begins to run. In the second case the cause of action does not accrue until the death of the person injured occurs, because the action is not for the injury sustained by the intestate, but for the death resulting from the injury, which is an independent and distinct grievance, created by statute, for which the personal representative alone may sue. This being true, the statute begins to run at the death and with the accrual of the cause of action. It is an indisputable rule that the statute of limitations can never begin to run until the cause of action accrues.

The essential facts necessary to a recovery in this case were the death of Simrall and the negligence of appellant in causing it. At common law an action would not lie to recover damages for causing the death of a person. Lord Campbell's act, passed by the English Parliament in 1846, was the forerunner of the many similar acts to be found on the statute books of the several states of the American Union. Section 241, Const. Ky., and section 6, Ky. Stats. 1903, in meaning closely follow it. Section 241 of the Constitution provides: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case,

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damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person." Section 6, Ky. Stats. 1903, is as follows: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is willful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages may be prosecuted by the personal representative of the deceased. The amount recovered, less funeral expenses, and the cost of administration, and such costs about the recovery, including attorney fees as are not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the follow order, viz.: (See section 241, Const.) * * *"

The provisions of Lord Campbell's act were first adopted in 1854 (1 Acts 1853-54, p. 175, c. 964) by an act of the Legislature of this State, in section 4 of which it was provided: "The actions under this act shall be commenced within one year from the time of such death." 2 Rev. Stats. (Stanton) pp. 510-512. The act of 1854, upon a revision of the statutes, was transferred to chapter 57 of the General Statutes, together with other provisions, under the title "Injuries to Persons or Property." Section 4, which

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prescribed the time within which actions allowed under the act should be brought, was, however, in form omitted from the General Statutes, but in substance retained in section 3, art. 3, c. 71, thereof; and as said in Carden's Adm'r v. L. & N. R. R. Co., 101 Ky. 113, 39 S. W. 1027, 19 Ky. Law Rep. 132: "It will be noted that the act of 1854, which thus gave right of action for loss of life, expressly provides that the limitation should be one year from the date of such death, and later in the general revision of the statutes the limitation clause was transferred to the chapter on 'Limitations,' and included in a section with others, and the phraseology was changed for the sake of brevity." In the next revision of the statutes we find section 3, art. 3, c. 71, Gen. Stats., transferred to section 2516 of the Kentucky Statutes of 1903.

As the act of 1854 settled and fixed the law as to limitation in such an action as this, in express terms, the change of phraseology made by section 3, art. 3, c. 71, Gen. Stats., on that subject, or the addition thereto of the clause "and not thereafter," should not be construed as a change in the law. As said in Overfield v. Sutton, 1 Metc. (Ky.) 621: "Where a law has been settled by clear expressions or adjudications, the mere change of its phraseology in a revision of the statutes cannot be construed a change of the law, unless such phraseology evidently purported to work a change." In other words, if section 4 of the act of 1854 is in meaning and effect included in section 3, art. 3, c. 71, Gen. Stats., then it must follow that it is also included in section 2516 of the Kentucky Statutes of 1903; and therefore it conclusively appears that from 1854 until the present day the legislative intent has been that the cause of action for the death accrues as of the date of the death. Such

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has been the ruling of this court in every case to which our attention has been called, and certainly no legislative act, during the more than 50 years of legislation since 1854, can be found altering or repealing this legislative intent.

The question under consideration was in effect settled in Carden's Adm'r v. L. & N. R. R. Co., supra. While it was the contention of the plaintiff in that case that the statute ran from the date of the appointment of the administrator, instead of the date of his death, the court held that it began to run at the death of the intestate, as the following excerpt from the opinion will show: "It seems evident that it was the intention of the Legislature to limit the time when actions could be instituted under this statute to one year from the day when the cause of action accrued, which undoubtedly was the date of the death." It will be found, too, that the doctrine announced in the Carden case was reaffirmed by this court in the later cases of C. & O. Ry. Co. v. Kelley's Adm'r, 48 S. W. 993, 20 Ky. Law Rep. 1238, and Wilson's Adm'r v. I. C. R. R. Co., 92 S. W. 572, 29 Ky. Law Rep. 148. A similar construction was given an Indiana statute, very much like our own, by the Supreme Court in Louisville, Evansville & St. Louis R. R. Co. v. Clarke, 152 U. S. 230, 14 Sup. Ct. 579, 38 L. Ed. 422.

We cannot agree with counsel for appellant that the court erred in instructing the jury as to the measure of damages. The instruction is as follows: "If you should find for the plaintiff, it should be in such a sum as you may believe from the evidence will reasonably and fairly compensate the estate of Wm. F. Simrall for the destruction of the power of Wm. F. Simrall to earn money, not exceeding $40,000, the

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amount claimed in the petition; and you can consider the age of the intestate, his capacity to earn money, and the probable duration of his life." It is insisted that this instruction should have contained, after the words "to earn money," the further words "caused by his death." We do not think the omission of these words was error, as the jury could not have failed to understand from the instruction as written that the only recovery to which appellee was entitled was for the destruction of his intestate's power to earn money resulting from the negligence of the appellant causing his death; nor can it be said that the instruction in meaning authorized the jury to take into consideration the sufferings endured by the intestate before his death, which resulted from his injury. The instruction in the form given the jury has been repeatedly approved by this court. L. & N. R. R. Co. v. Kelly's Adm'r, 100 Ky. 436, 38 S. W. 852, 40 S. W. 452, 19 Ky. Law Rep. 69. Besides, it does not appear from the record that appellant asked or offered an instruction in respect to the measure of damages, and, as said in Patterson v. Moss Tie Co., 97 S. W. 379, 30 Ky. Law Rep. 10: "It is a well-settled rule of this court that a litigant cannot complain of instructions correct in themselves, though inadequate, given by the court, unless he offers additional instructions to be given in lieu thereof."

It is our conclusion that no error of substantial import was committed by the lower court in this case. Wherefore the judgment is affirmed.

Judge Barker dissents.

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CASE 10.—ACTION BY JOHN B. FARIS AND ANOTHER TRUSTEES OF HENRY CLAY FARIS, AN INCOMPETENT, AGAINST THE EXECUTORS OF VINCENT BOREING, DECEASED, FOR A SETTLEMENT OF HIS ACCOUNTS AS FORMER TRUSTEE OF SAID INCOMPETENT.—November 1.

Boreing, &c. v. Faris, &c.

Appeal from Laurel Circuit Court.

H. C. FAULKNER, Circuit Judge.

Judgment for plaintiffs, defendants appeal.—Affirmed.

1. Trusts—Executors of Trustee—Compelling Account—Demand.—Where a trustee died without settling his account, and his executors failed to account, no affidavit or demand was necessary by succeeding trustees before suit to compel such executors to account, within Ky. Stats., 1903, sections 3870, 3872, 3874, providing for the filing of claims with executors, accompanied by an affidavit that the demand was just, that there was no offset or discount against it, and that it had not been paid.
2. Same—Presentation of Claim—Necessity.—Ky. Stats., 1903, sections 3870, 3872, 3874, requiring the filing of a claim against executors, accompanied by an affidavit that the demand was just, that it was subject to no offset or discount, and had never been paid, were not designed to interfere with the ancient jurisdiction of equity to settle the accounts of fiduciaries, and require the funds in their hands to be paid over to their successors.
3. Same—Trustee—Appointment.—Testator bequeathed certain property in trust for his son F., an incompetent, and provided for the appointment of a trustee by the county court. B. was appointed and qualified. Thereafter F.'s sister also bequeathed a legacy to B., in trust for F., designating B. as F.'s "committee." B., who was also executor of the sister's will, took charge of the legacy as trustee, and subsequently

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died without having settled his account, when complainants were appointed generally as F.'s trustees in B.'s place. Held, That complainants were entitled to recover from B.'s executors and hold all funds belonging to F., however bequeathed to him.

4. Same—Designation of Trustee—Sufficiency.—Where testatrix bequeathed a legacy to her incompetent brother's trustee, in trust for the brother's benefit, a description of the trustee as the beneficiary's "committee" was equivalent to a designation as trustee.

5. Same—Accounting by Trustee's Executors—Interest.—Where a trustee failed to account during his life, his executors, on being required to account, were properly charged with interest after the trustee's death to the date of the judgment; the trustee being required to invest the trust fund so as to make it bear interest, and, if he did not, his estate was chargeable with interest.

6. Same.—Ky. Stats., 1903, section 3884, providing that no interest accruing after decedent's death shall be allowed or paid on any claim out of decedent's estate, unless a claim be filed and authenticated, as required by law, and demanded of the executor, administrator, or curator within a year after his appointment, does not apply to the liability of the executor of a deceased trustee, who died without accounting; action being brought against such executors to compel them to account within a year after the trustee's death and their qualification as executors.

7. Same—Accounting—Interest.—The trustee of an alleged incompetent, who had never been found of unsound mind by an inquest, purchased a horse from such incompetent and kept the purchase price as his trustee. Held, That the trustee never having filed an account prior to his death, his executors were properly charged with the price, with 6 per cent. interest thereon.

8. Costs—Executors—Accounting.—Where executors of a deceased trustee, who had died without accounting, also failed to make a settlement of their testator's account as trustee, and suit was brought by substituted trustees to compel the executors to account, in which the trustees were successful, the executors were properly chargeable with costs under Ky. Stats., 1903, section 889, providing that in actions in equity the party succeeding on the merits or otherwise shall recover his costs, except against nominal defendants.

COOK & JAMES, attorneys for appellants.

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The grounds we rely on for reversal are as follows:

1. The judgment is expressly prohibited by sections 3870, 3872 and 3874 of Ky. Stats. as the expurgatory affidavit required by those sections was not made or filed by appellees before rendition of the judgment.

2. The second clause of the judgment is wholly unauthorized, because the appellees are not trustees under the will of Dora B. Faris, nor trustees of the fund bequeathed by her to H. Clay Faris—they are trustees only under the will of James M. Faris, and only of the fund bequeathed by him to H. Clay Faris.

3. The whole of said judgment, in any event, is erroneous, in that the appellants are adjudged to pay interest up to the date of the judgment, when no interest should have been allowed on either fund subsequent to the death of the testator, Vincent Boreing.

4. The said judgment is, moreover, grievously erroneous and contrary to principles of equity, in that the entire costs of the action are adjudged against the appellants, when, in any event, they are blameless and made a just defense to the action, and would not have been justified in paying any moneys to the appellees without this litigation, and when it is plainly apparent that the appellees would not have accepted the amount which the court adjudged.

SAM C. HARDIN, attorney for appellees.

D. K. RAWLINGS of counsel.

1. There is no stronger or better established principle than that a trust will not be permitted to lapse for want of a trustee. Upon the death of Vincent Boreing, under the will it was necessary that there be a successor appointed to carry out the trust. Acting under that principle appellees were appointed trustees for H. Clay Faris, and thereby they not only became trustees of the fund left by James M. Faris, but also of the fund bequeathed by Dora B. Faris and of any other trust estate to which H. Clay Faris was entitled.

2. Vincent Boreing being chargeable in his life-time with interest on these funds, the fact of his death would not stop the interest.

3. If appellants had acted in good faith and filed a suit in chancery asking direction of the chancellor as to the proper payment of this trust fund, they would have been entitled to whatever costs they so incurred, but having vindictively fought the payment of this trust fund in the lower court and by appeal

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to this court, they are not entitled to have their costs paid out of the estate.

AUTHORITIES CITED.

Huffman v. Moore, 101 Ky., 288; Gray's Exr. v. Lewis, etc., 79 Ky., 453; Fox, etc., v. Apperson's Exr., 6 Bush, 653; Lyon's Exrx. v. Logan County Bank, 78 S. W. 54, 25 Ky. Law Rep. 1668.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

James M. Faris by his will, dated November 25, 1885, made the following provision for his son, Henry Clay Faris: "As my son Henry Clay Faris is not deemed of sufficient mind to manage his part of my estate and to insure to him the benefit of same, it is my desire that the Laurel county court at the time of my death or as soon as practicable thereafter shall appoint a trustee or guardian to take charge of and hold in trust for him the one thousand dollar note with accrued interest to that date that I hold on the Altamont Coal Company, with C. Crooke as president, it being the last payment on the two hundred acre tract of land upon which the town of Altamont now stands. I deem this note as being equivalent to the full amount that the said Henry Clay Faris would under the law be entitled to out of my estate. It is my will that said trustee shall annually collect the interest on said note and invest same for the use and benefit of said Henry Clay Faris and expend same for him when necessary for health and comfort, but in no case expend more than the interest on said note or the proceeds arising therefrom unless demanded by extreme necessity. Said trustee or guardian must before taking charge of any funds execute an unquestionably good bond for the faithful carry-

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ing out of the provision of this will upon which he shall be liable for the proper management and disbursement of said property as are all other custodians of trust funds. * * * If Henry Clay Faris dies without (issue) the unexpended proceeds of note reverts to my heirs." On January 25, 1886, Vincent Boreing qualified in the Laurel county court as trustee for Henry Clay Faris and took charge of the funds devised to him by his father. Dora B. Faris, a sister of Henry Clay Faris, died in the year 1897. By her will she made the following provision for him: "I give, devise and bequeath unto Vincent Boreing and his successors as committee for my brother Clay Faris, for the use and benefit of the said Clay Faris, one-third of my interest in the net proceeds of the firm of Jones & Faris heretofore mentioned." Vincent Boreing was also the executor of her will, and he took charge as trustee for Henry Clay Faris of the funds devised him by his sister. He continued to hold these funds as trustee until his death on September 16, 1903, without having made a settlement of his accounts. After his death a litigation ensued between the relatives of Henry Clay Faris as to who should be his trustee. The county court appointed E. H. Johnson. An appeal was taken from the order to the circuit court, and on the appeal it was held by the circuit court that Joe Young and John B. Faris should be appointed joint trustees. They thereupon qualified and gave bond on June 20, 1904. On September 1, 1904, this suit was brought by J. B. Faris as trustee against Vincent Boreing's personal and real representatives for a settlement of his accounts as trustee and to recover judgment for the amount found due. It was charged that the personal estate of Boreing was not sufficient to pay

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his debts, and a sale of land was prayed for the payment of the amount found due. It was alleged that Joe Young, as trustee, refused to join in the suit, and he was made a party defendant. Afterward Young filed his petition and was made party plaintiff. The executors filed an answer denying that the personal estate of their testator was insufficient to pay his debts. The case was referred to a commissioner to settle the accounts of Boreing as trustee, and, judgment having been entered by the circuit court, modifying the commissioner's report, and confirming it as modified, and directing the executors to pay over the amount found due to the plaintiffs, the executors appeal.

It is insisted for the executors that the judgment is erroneous, because no affidavit was filed in the circuit court, as required by sections 3870, 3872, 3874, Ky. Stats. 1903, to the effect that the demand was just, that there was no offset or discount against it, and that it had never been paid. No objection was made in the circuit court on account of the want of the affidavit. This is not the character of action in which there must be an affidavit and demand of the executors before the suit is brought. The decedent was the trustee of the fund. It was his duty to have made a settlement of his accounts as trustee, and when he died without having made a settlement it was the duty of his executors to make such a settlement. When they failed to make it, the only remedy for the present trustees was a suit to have the trust settled. In such a case no affidavit or demand is necessary. In Fox v. Apperson, 6 Bush 653, this court so holding said: "When the amount of the claim against a deceased debtor can be known and verified, then, to save the expense of litigation and

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to secure his representative by an accredited voucher, the statute prescribes the affidavits and demand; but to carry the requisition further would unreasonably pervert the statute, and obstruct remedy to the frustration of justice. The object of the statute was to facilitate justice; and, properly construed according to its aim, it requires nothing unreasonable or impracticable—certainly no such absurdity as a specific demand, when the claimant cannot know what to demand, and when, as in such a case as this, it would be always unavailing to the claimant, and unsafe to the personal representative." The chancellor, with the assistance of his commissioner, made the settlement. He excluded everything from the settlement that was not justly chargeable to the former trustee. The present trustees have no personal knowledge of the matters, as they had no connection with the estate until their appointment. The case does not come, therefore, within the purview or intent of the statute. It was not designed to interfere in any way with the ancient power of courts of equity to settle the accounts of fiduciaries and require the funds in their hands paid over to their successors. The chancellor in such cases merely ascertains the amount of the trust fund, and orders the trust carried out by the payment of the fund to the present trustee. From the nature of the case there could be no demand accompanied with affidavit pursuant to the statute before the action is brought and a settlement made; and after the settlement is made for the present trustees to file their affidavits as provided in the statute would serve no good end, as they had nothing to do with the estate before their appointment, and the judgment simply determines the amount of the estate in the hands of their predecessor.

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It is also insisted for the executors that the judgment is erroneous, because the present trustees are not trustees under the will of Dora B. Faris or of the fund bequeathed by her, but only under the will of James M. Faris and of the fund bequeathed by him. The order of the court appoints the plaintiffs as trustees of Henry Clay Faris. They are not appointed trustees under either will. As trustees of Henry Clay Faris they may recover and hold any funds belonging to him, whether left to him by his father or by his sister. It is perfectly apparent from Dora B. Faris' will that she intended Vincent Boreing, who was then the trustee of her brother, to hold as such trustee the fund which she devised to him. It is true she styles him "committee," and not "trustee;" but the word "committee" there has the same meaning as "trustee." It was her intention that the fund she devised should be added to the fund which her father had devised to take care of her afflicted brother. The present trustees are the trustees of both funds.

There was no error of the court in adjudging the executors to pay interest after the death of Boreing up to the date of the judgment. It was incumbent upon the trustee to invest the fund for his ward so as to make it bear interest. If the fund was invested by him, his estate could not keep the interest accruing after his death, but was bound to pay it over to his successors. If the trustee had not invested the funds, but had used them himself, he to this extent failed in his duty as trustee; and he cannot be allowed to stand in a more favorable light than if he had done his duty and lent out the funds. When, as trustee, he lent the fund to himself, he cannot be heard to say that the fund was not producing interest. There is nothing in the record to bring the case within section

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3884, Ky. Stats. 1903, which is as follows: "No interest accruing after his death shall be allowed or paid on any claim against the decedent's estate unless the claim be verified and authenticated as required by law, and demanded of the executor, administrator or curator within one year after his appointment." There was no showing made in the circuit court that the statute had not been complied with; but, aside from this fact, it is not the kind of case to which the statute applies, as the accounts of the trustee had not been settled, and no demand could be made. Richardson v. Banta, 23 S. W. 350, 15 Ky. Law Rep. 348. The action was brought for a settlement within one year after the death of Vincent Boreing and the qualification of his executors.

Henry Clay Faris had a horse, which he sold to Vincent Boreing for $90. Boreing did not pay him the money, but held it for him as trustee. Faris has never been found of unsound mind by an inquest. This $90, while not included in the will of his father or his sister, was a trust fund held by Boreing for him. Boreing's security might not be answerable for it, but Boreing himself was responsible for it. Faris, by allowing Boreing to keep the money as trustee, made him the trustee of this fund, and Boreing is responsible for the fund, with 6 per cent. interest, as adjudged by the court. When the trustee dealt with his ward, he is in the same position as to the $90 as he would be if a third person had placed the amount in his hands as trustee for his ward. The present trustees hold all the funds as trustees of Henry Clay Faris. Whether Faris might be entitled to have the trust discharged as to any part of the fund is not a question now presented. The court properly charged Boreing's estate with $90 and inter-

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est, for the reason that, when Henry Clay Faris allowed the $90 to remain in his trustee's hands, it was held by Boreing for him as trustee, and, being trustee, he must account as trustee for it.

The court did not err in adjudging the defendants to pay the cost of the action. Section 889, Ky. Stats. 1903, provides: "In actions in equity the party succeeding on the merits or otherwise shall recover his costs except against nominal defendants." The executors had failed to make a settlement of the accounts of their testator as trustee of Henry Clay Faris. If they had made a settlement, and this was a suit to surcharge a settlement made by them, in which the plaintiffs had recovered nothing more than they admitted in the settlement made by them, a different question would be presented. The fact that the plaintiffs did not recover as large a judgment as they claimed is immaterial. They recovered a judgment for a considerable sum, and are therefore entitled to recover their cost.

Judgment affirmed.

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CASE 11.—ACTION BY GEORGE TERRELL AGAINST THE LOUISVILLE WATER CO. AND THE CITY OF LOUISVILLE FOR DAMAGES FOR FAILING TO FURNISH AN ADEQUATE SUPPLY OF WATER FOR PROTECTION FROM FIRE.—November 7.

Terrell v. Louisville Water Co.

Appeal from Jefferson Circuit Court; Common Pleas Branch; Second Division.

THOS. R. GORDON, Judge.

From a verdict for defendants directed by the court the plaintiff appeals—Affirmed.

1. Waters—Water Company—Defects in Fire Cisterns.—Section 6 of the charter of the Louisville Water Company provides that the company shall keep water enough in its mains to extinguish fires. While plaintiff's buildings were burning water could not be had from one place because of a defect in the fire cistern, and from another place because of the cistern being so covered with snow that the firemen could not find it for ten minutes. The proof showed that there was an abundant supply of water in the mains. Held, That the water company is not liable to the owner of the buildings, since the fire cisterns are constructed by the city and are under its exclusive control.
2. Municipal Corporations—Torts—Acts of Agents.—A city is not liable to a property owner for the negligence of its firemen.
3. Same—Performance of Governmental Function.—A city is not responsible to a property owner, if one of its fire engines is by negligence allowed to get out of repair, and by this means his property is lost.
4. Same.—In building cisterns for fire protection, a city acts in a governmental capacity, and is not liable for damages by fire because of their being out of repair.

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BENNETT H. YOUNG and MARION W. RIPY, attorneys for appellant.

1. Under the previous rulings of this court, the lower court was authorized to give the peremptory instruction to the jury to find for the city of Louisville, but we respectfully submit that the former rulings of this court are incorrect, and that upon a careful and thoughtful reconsideration will be overruled.

2. The evidence shows clearly that the water company failed to do its duty as required by its charter, the opinion of the learned trial judge to the contrary notwithstanding. Under its charter it is its duty to keep in its mains at all times an abundant supply of water for fire protection. There can be but one meaning to this; that it is its duty to see that the public cisterns are at all times filled with sufficient water for the extinguishment of fires, and that its mains are so constructed and kept and operated as that the cisterns may be replenished as rapidly as the water is pumped therefrom by the city's fire department. We submit that the destruction of appellant's property, as shown by the evidence, was the result of the water company's culpable neglect in these particulars.

BURNETT & BURNETT for appellees.

POINTS.

1. Duties of water company, to furnish water for fire protection are performed when its water mains are laid in the streets so that an abundant supply of water can be withdrawn therefrom, to the cisterns, hydrants and attachments furnished by the municipality for fire protection. Section 6, charter of water company.

2. Municipalities.—The city is alone chargeable with the construction and maintenance of fire cisterns, hydrants, and attachments for fire protection. [Ky. Stats., section 2833.]

3. Negligence will not be presumed, and must be proven, and where there is no duty owed, there can be no action sustained because the act complained of was not performed by a party not charged with that duty.

4. Peremptory instruction should be given where there has been no evidence offered to show negligence, and where there is no law charging a duty.

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OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

George Terrell is the owner of a lot on the west side of Brook street, between Chestnut and Walnut, in the city of Louisville. On the lot there were two buildings. One was his dwelling house, and the other was a planing mill. On January 31, 1905, about midnight, the planing mill took fire and burned down. The fire was communicated from the planing mill to the dwelling house, and that also burned. He then brought this suit against the city of Louisville and the Louisville Water Company, charging that the loss of his property was due to their negligence in failing to furnish an adequate water supply for fire protection. At the conclusion of the evidence introduced by him, the court peremptorily instructed the jury to find for the defendants. This was done, and, his motion for a new trial having been overruled, he appeals.

The proof on the trial showed, in substance, that when the first alarm was turned in three engines came promptly to the fire. The first engine undertook to get water from a fire cistern at Brook and Water streets, but by reason of a defect in the valve it could get no water, or not enough to do any good. Some of the witnesses say that it got water for 10 minutes, and that then the water ceased by reason of a defect in the valve. Another one of the engines undertook to get water from the fire cistern at Brook and Madison streets; but there was snow on the ground. The street car company had cleared its track, piling the snow at one side. By reason of this the firemen were unable for 10 minutes to locate the

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cistern top or get into it. The third engine got water from a hydrant back of the buildings. Later other alarms were turned in, and a number of other engines came, which got water at other hydrants or cisterns further off from the property; but before this was done both of the buildings were substantially destroyed by fire.

There is nothing in the proof conducing to show that there was any lack of water in the mains of the water company. On the contrary, the witnesses who were introduced by the plaintiff testify that there was plenty of water in the mains. Section 6 of the charter of the water company contains this provision: "In the laying and construction of water pipes and aqueducts in the city of Louisville, the same shall be so laid and constructed that an abundant supply of water can be drawn therefrom for the extinguishment of fires; and said corporation shall furnish water to the city of Louisville for the extinguishment of fires and cleaning streets, upon such terms as may be agreed between it and the authorities of said city." The proof shows that an abundant supply of water could be drawn from the mains. The trouble was not in a lack of supply. The difficulty was that the supply in the mains could not be gotten into the engines. The proof does not show any fault on the part of the water company, as the fire cisterns are constructed by the city and are under its exclusive control.

As to the city of Louisville, the peremptory instruction was also proper. In furnishing to its citizens fire protection, the city is discharging a governmental function. It is well settled that the city is not responsible in damages for negligence of its firemen. The same principle must apply to the other agencies

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employed by the city as part of its fire department. The city is not responsible to a property owner if one of its fire engines is by negligence allowed to get out of repair, and by this means his property is lost. The thing that was out of repair here was a valve at one place, and at another the top of the cistern was so covered up with snow and ice that it took the firemen some 10 minutes to locate and open it. In building these cisterns the city acted in a governmental capacity, and it is no more liable to the property owner for their being out of order than it would be if the fire chief had been negligent in responding promptly to the alarm, or in his efforts to put out the fire after he arrived on the scene. The cases in which this court has made water companies liable, where property was lost by their failure to furnish a supply of water, all rest upon contracts which had not been performed by the water company and which were held to be made by the municipality for the benefit of the citizens. The liability of a city for an injury to a traveler on one of its highways rests upon the ground that the city owns the highway, and, like other owners of real estate who invite the public upon their premises, must keep them reasonably safe. Greenwood v. Louisville, 76 Ky. 226, 26 Am. Rep. 263; Davis v. Lebanon, 108 Ky. 688, 57 S. W. 471, 22 Ky. Law Rep. 384; Twyman v. Frankfort, 117 Ky. 518, 78 S. W. 446, 25 Ky. Law Rep. 1620, 64 L. R. A. 572; 20 Am. & Eng. Encyc. 1193, 1194.

Judgment affirmed.

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CASE 12.—ACTION BY MARY SCHWAB AGAINST THE LOUISVILLE, HENDERSON & ST. LOUIS RY. CO., ETC., FOR DAMAGES FOR PERSONAL INJURIES.—November 8.

L., H. & St. L. Ry. Co. v. Schwab

Appeal from Jefferson Circuit Court; Common Pleas Branch; Third Division.

MATT O'DOHERTY, Judge.

Judgment for plaintiff, defendant appeals—Reversed.

1. Jury—Selection and Drawing of Panel.—Ky. Stats., 1903, sections 2241, provides that the jury commissioners shall take the last returned assessor's books and from it select intelligent and impartial citizens to the number therein prescribed; that each name so selected shall be by them written on a slip of paper, and that each slip shall be by them inclosed in a small case made of paper, and deposited in a revolving drum or wheel; and that while so engaged in making the jury list no person shall be permitted to be with them. Held, That if jury commissioners did not themselves write the names of the jurors on slips of paper and place them in the cylinders or wheel, but merely checked off the names on the assessor's book and authorized or requested two clerks of the court to write the names checked off and place them in the cylinders or wheel, the selection of the panel was bad, as against a challenge to the array before trial, though it be not made to appear that the challenging party was thereby substantially prejudiced, in that the jurors so selected were in any respect objectionable.
2. Evidence—Presumptions—Performance of Official Duty—Jury Commissioners.—Jury commissioners are officers of the court, and the presumption is that they did their duty; but this presumption may be overcome by evidence that they did not.
3. Witnesses—Privilege of Witnesses.—Constitution section 11, providing that no person shall be compelled to give evidence against himself, applies in all cases where punishment may

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be inflicted, and protects a jury commissioner in declining to testify as to violations of the statute prescribing the method of selection of jury panels, in that the commissioners authorized clerks of the court to perform acts which they themselves should have performed, since being an officer of the court, the willful violation of his duty would constitute a contempt, but does not protect the clerks of the court, since, as officers of the court, they have no duties to perform in the selection of juries, and are not otherwise punishable for such acts.

4. Trial—Right to Open and Close.—A carrier, sued for gross negligence, has not the burden of proof, entitling it to close, by admitting that plaintiff was a passenger and injured in a collision; such facts merely raising a presumption of ordinary negligence.

HELM & HELM for appellant, L., H. & St. L. Ry. Co.

FAIRLEIGH, STRAUS & FAIRLEIGH and GREENE & VANWINKLE for appellant, Louisville Ry. Co.

BENNETT H. YOUNG and MARION W. RIPY for appellee.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Appellee, alleging that she was injured in a collision between a freight train operated by appellant Louisville, Henderson & St. Louis Railway Company and one of the cars of appellant Louisville Railway Company, caused by the negligence of the companies, brought this action to recover damages from each of them. A trial was had before a jury, and a verdict rendered against both appellants.

The principal error assigned by appellants is the failure of the trial court to sustain the motion made by them at the beginning of the trial to discharge the panel for misconduct of the jury commissioners in failing to select the jurors in the manner prescribed by the statute, "in that the commissioners did not

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write the name of each juror on a slip of paper and place them in the drum wheel, but merely checked off names on the assessor's book and employed others not under oath to do the really important work of writing off the names and putting them in the wheel; the persons so employed not being under the direct supervision of the commissioners, who did not know whether they did the work assigned to them right or wrong." In support of this motion affidavits of the president and attorney of the railway company were filed. In these affidavits the parties making them did not assert that they had personal knowledge of the facts stated, but averred that they were informed and believed them to be true. After making the motion and filing the affidavits, appellants requested that Mr. Schuff, one of the jury commissioners, who was present in court, be sworn to testify concerning the action of the commissioners in selecting the jurors, and also produced and offered to have sworn Mark Ryan and Frank Dacher, clerks of the court. When Mr. Schuff was called, the trial judge said to him: "You are a commissioner of this court, appointed by this court, or rather appointed by Judge Gordon, and I wish to say to you that you do not have to testify unless you choose. Do you desire to be sworn, Mr. Schuff?" To which Mr. Schuff responded, "No sir." The judge then said: "You do not have to be sworn." To this statement counsel for appellants objected, and avowed that if Mr. Schuff was sworn "he would state that he was one of the jury commissioners last appointed by the court; that he and the other commissioners attended at the time appointed for the purpose of selecting the jurors to be placed in the wheel drum; that they went over the assessor's book with a lead pencil, checking the names

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of 8,000 men; that they then left the courthouse; that they did not write the names of any of the jurors on slips of paper, nor put said slips in cylinders, but this was done by two clerks of this court, namely Frank Dacher and Mark Ryan, who wrote the names on the slips and put the slips in the cylinders; that they did this in the absence of the jury commissioners; that the commission then reconvened and separated the cylinders, placing 2,000 in each wheel drum; that they did not know and had no means of knowing that the slips of paper upon which the names were placed contained the same names as those which they marked off on the assessor's book; that during the time that the commissioners were at work these clerks were also present; and, further, that Schuff would state that they only knew a very small per cent. of the names marked off by the commissioners, that they took no pains to ascertain the occupation or avocations of those jurors, and did not know whether they possessed the statutory qualifications of honesty, sobriety, and intelligence, and that they took no pains to ascertain whether they possessed them."

Mr. Ryan was then called upon by counsel for appellants to testify, whereupon the judge said: "If a clerk of this court interfered with the commissioners, he subjects himself to punishment." Then the following took place: "Court: You are a deputy clerk of this court, Mr. Ryan? Ryan: Yes, sir. Court: Were you here as a deputy when the jury commissioners were appointed? Ryan: I think I was. Court: Now, the proposition is to have you sworn in this case. You have heard the avowal made by counsel herein, and the proposition is to have you testify in regard to these matters. I wish to say to you that it

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is your privilege to testify or not as you please. Ryan: If it is left for me to elect, I decline to testify." The avowal was then made that if Mr. Ryan testified he would state "that he was requested by the commissioners last appointed by the court to select jurors to come into the place where they were, and to write off from the assessor's books the names of persons whom they indicated by a lead pencil mark, and that said commissioners did check off approximately, 8,000 names, and then left the courthouse; that then he (Ryan), who was a deputy clerk of the court, in connection with Frank Dacher, another deputy clerk, wrote these names from the assessor's books on separate slips of paper and placed them in cylinders; that this was done with this exception, that wherever he and Dacher thought the names marked off were men who were not properly qualified to act as jurors, they did not write their names on slips of paper or put those names in cylinders, but in each instance they made a little 'o,' indicating that they did not use those names selected by the commissioners; that Ryan would further state that the clerks were in the room at the time the commissioners were doing their work; that the commissioners were not in the room or in the courthouse, so far as he knows, at the time he and Dacher wrote off the names on slips of paper, nor at the time when they put them in the cylinders; that when the commissioners returned they did not take any pains whatever or make any effort to ascertain whether the names in the cylinders were the same names they had checked off."

Mr. Dacher was then called by counsel for appellants, who asked that he be sworn; but by permission of the court he declined to be sworn or answer questions, and an avowal was made that if required to

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testify he would make the same statements in substance as that contained in the avowal made of what Ryan would say.

Ky. St. 1903, section 2241, provides in part that "the circuit judge of each county shall at the first regular term of circuit court therein after this act takes effect, and annually thereafter, appoint three intelligent and discreet housekeepers of the county, over twenty-one years of age, residing in different portions of the county, and having no action in court requiring the intervention of a jury, as jury commissioners for one year, who shall be sworn in open court to faithfully discharge their duty. They shall hold their meetings in some room to be designated by the judge, and while engaged in making the list of juries and selecting the names, writing and depositing or drawing them from the drum or wheel case, no person shall be permitted in said room with them. They shall take the last returned assessor's book of the county and from it carefully select from the intelligent, sober, discreet and impartial citizens, resident housekeepers in different portions of the county, over twenty-one years of age, the following number of names of such persons, to-wit: (then follows the number that shall be selected from each county, graded according to the population.) Each name so selected they shall write in plain handwriting on a small slip of paper, each slip of paper being as near the same size and appearance as practicable; and each slip with the name written thereon shall be by them enclosed in a small case made of paper or other material and deposited unsealed in the revolving drum or wheel case hereinafter provided for."

In answer to the argument made for appellants, it is said for appellee that the record does not show that

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the substantial rights of appellants were prejudiced by the action of the court in overruling the challenge to the array; and it is further suggested that it was entirely proper that the judge should advise the jury commissioners and the clerks that they had the right to claim the privilege of not testifying, as, if they gave evidence sustaining the avowals made, they would subject themselves to punishment for contempt, and no person can be required to give testimony against himself. The record does not disclose that the members of the panel from which the jurors were selected to try the case were in any respect objectionable, and in this particular the substantial rights of appellants were not prejudiced by the rulings of the trial court; but, in a matter that strikes at the very foundation of our system of selecting jurors, we do not deem it material or necessary that any prejudicial error shall be made to appear, other than a substantial one committed in failing to select the juries in the manner pointed out in the statute. It is probable that the jurors selected to and that did try this particular case were men who possessed all the statutory qualifications; and it may also be conceded that they were entirely acceptable to counsel and parties on both sides. But back of this is the more important question that litigants have the unqualified right to demand that juries shall be selected in the manner prescribed in the statute, and in passing on this right the individual qualification of the juror or the fact that he may be entirely acceptable to the parties is not to be considered. If the contention of appellee was sound, the careful and elaborate scheme devised for selecting juries would be nullified, the statute would be a dead letter, and no inquiry could be made into the manner in which jurors were orig-

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inally chosen, if those selected to try the particular case possessed the statutory qualifications and were personally satisfactory. The Legislature, in obedience to a popular demand that a radical change be made in the manner of selecting juries, after long delay and much discussion, enacted the statute now in force; and this court in more than one case has given to this law the sanction of its approval and declared that its efficiency shall not be impaired or destroyed by the failure of public officers to observe its requirements.

Thus, in Curtis v. Com., 23 Ky. Law Rep. 267, 62 S. W. 886, a motion was made to discharge the entire panel of petit jurors, because the names of the jurors were not drawn from the jury wheel as they should have been, but were selected from a list regularly summoned in a previous month. This being a criminal case, this court had no power to review the action of the trial court in overruling the challenge to the array, but in the course of the opinion said: "These men so selected may have been, and doubtless were, of the very best citizenship in the county; but they were not drawn impartially from the body of legally qualified jurymen of the county. The mode provided by law for the selection of qualified and impartial jurymen was ignored, and the jury were selected by the judge of the circuit court himself. This was clearly erroneous. He may have done this with the very best of motive, but it was not the method provided by law, and should not have been done." In Covington & Cincinnati Bridge Co. v. Smith, 25 Ky. Law Rep. 2292, 88 S. W. 440, in discussing this jury law, the court said: "The statutes quoted provide an elaborate system for the selection monthly in courts of continuous session of impartial

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jurymen fresh from the body of the people. If these provisions are enforced, each litigant is guaranteed that the best effort possible has been made to secure for the trial of his case an impartial jury. It is not believed that the requirements in the statute in regard to the selection of juries would have been set forth with such minute particularity and detail, if it had been intended that the court might nullify the manifest intention of the Legislature by ignoring them." In Risner v. Com., 95 Ky. 539, 26 S. W. 388, 16 Ky. Law Rep. 84, the jury commissioners did not put in the wheel the number of names required, and the court said: "While it is not made to directly or certainly appear that appellant was thereby substantially prejudiced, still he had the right to insist upon being tried by only a jury obtained according to the statute, which was passed for the purpose of securing fair and impartial jurors; and, to more effectually accomplish that end, the names of at least 200 persons should have been placed in the drum or wheel case. This provision cannot be disregarded in any substantial particular without defeating one of the principal purposes of the statute." Central Kentucky Asylum for the Insane v. Hauns, 21 Ky. Law Rep. 22, 50 S. W. 978, to which our attention is called by counsel for appellee, is not in point; nor is it in conflict with the authorities cited. There the objection to the manner in which the jury was selected was not made until after the trial was completed, and hence came too late to be available.

If the methods avowed to have been adopted in this case by the commissioners are upheld, all the safeguards thrown around the selection of juries will be virtually abolished, and the effort of the legislative department to improve and elevate the jury system a

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failure. The juries are almost entirely composed of men selected by the commissioners, and this power confided to them cannot be delegated in whole or in part to others. No minor officers connected with the administration of justice have more important duties to perform than do the jury commissioners. Upon their judgment and discretion in the selection of intelligent, sober, discreet, and impartial citizens and housekeepers of the county depends in a large measure the pure and impartial administration of justice in the conduct of jury trials, and this valuable privilege ought not and will not be frittered away merely because delay or inconvenience to the court or litigants may result from sustaining a challenge to the array because of substantial irregularity in the selection of the juries. It is infinitely better that there should be some delay in the trial of cases or inconvenience suffered by individuals than that a statute intended to safeguard the rights of all litigants should be totally disregarded. If the mistake or irregularity was a minor one, we would not regard it as material; but, if the avowals made are true, the statute was violated in several substantial particulars. The provisions disregarded are not directory, but mandatory. They constitute the very substance and life of the law, and may not lightly be ignored or disobeyed. No fraud or improper purpose can be imputed to these commissioners, nor is it necessary that it should be. Doubtless they acted in good faith, but nevertheless in open disobedience of the law under which they were selected, and their conduct can neither be overlooked nor approved.

The jury commissioners are for the time being officers of the court, and the presumption is that they did their duty; but this presumption, like all

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others, may be overcome by evidence that they did not. But, if the rulings of the trial judge in admonishing the commissioners and the clerks that they need not testify and in suggesting to them that they might subject themselvse to punishment for contempt if they did so, were correct, it would be almost impossible to ascertain whether or not commissioners in the performance of their duties observed the law. The statute does not provide any punishment that may be imposed upon jury commissioners for disobedience of the law, and it was scarcely necessary that it should, as the statute prescribing their duties is plain, and it contemplates that they shall be men of intelligence and character. Being officers of the court, charged with specific duties, a wilful violation of them would be a contempt of court that would render the commissioner amenable to punishment. This being so, it was proper that the court should have admonished Mr. Schuff that, if he testified to a disregard of the law, he might subject himself to such punishment within legal limits as the court might see proper to administer. The provision found in section 11 of the Constitution, providing that no person shall be "compelled to give evidence against himself," applies in all cases in which punishment may be inflicted, the privilege not being confined to statutory offenses, and protected the commissioner in declining to testify. Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

But this privilege did not extend to or protect Ryan or Dacher. They violated no written law, and under the circumstances were not guilty of contempt. As officers of the court they had no duties to perform in connection with the selection of the juries. In assisting the commissioners, if they did so, they were

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occupying the same relation as any other stranger, who might act upon their request and without intending to violate the law. Not being subject to punishment for contempt or otherwise, there is no reason why they should not be required to answer such reasonable and pertinent questions propounded by counsel making the motion as might be necessary to bring out fully the facts.

In addition to the error heretofore mentioned, appellants complain of the instructions of the court, insisting that they were erroneous and prejudicial. This assignment we do not deem it necessary to discuss, as the points made have been determined against appellants by this court in other cases and appeals growing out of the collision in which appellee was injured.

The Louisville City Railway Company further insists that it should have been permitted to assume the burden of proof, and therefore the right to conclude the argument before the jury; and this upon the ground that, having admitted the collision and that appellee was a passenger in its car at the time, it was necessary that it should explain away the presumption of negligence arising from these admissions. It is true that, when a passenger in custody of a common carrier is injured, the law presumes negligence on its part; but this presumption only goes to ordinary negligence. It will not be presumed that the carrier was guilty of gross negligence. It was sought in this case to recover for gross negligence, and therefore the burden was upon the plaintiff to show that the carrier was guilty of that degree of neglect. Southern Ry. in Ky. v. Steele, 28 Ky. Law Rep. 764, 90 S. W. 548; Id., 29 Ky. Law Rep. 690, 94 S. W. 653; Southern Ry. Co. in Ky. v. Lee, 30 Ky. Law Rep. 1360.

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For the error mentioned, the judgment must be reversed; and upon request of appellants the court should require Ryan and Dacher to give evidence and answer such questions within their knowledge as may be necessary to fully disclose the manner in which the juries were selected by the commissioners, and if, from this evidence, it appears that the commissioners did not write the names of the jurors on slips of paper and place them in the cylinder and drum wheel, but merely checked off the names on the assessor's books, and authorized or requested Ryan and Dacher, or either of them, to write the names checked off and place them in the cylinder or wheel, the court will set aside the verdicts and judgments thereon and grant appellants a new trial; otherwise, they will be permitted to stand

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CASE 13.—SUIT BY ISAAC HILLIARD AGAINST THE GEORGE G. FETTER LIGHTING & HEATING CO., ETC., TO ENJOIN THE BOARD OF PUBLIC WORKS FROM GRANTING SAID COMPANY A PERMIT TO CONSTRUCT CONDUITS, ETC., FOR CARRYING ELECTRIC WIRES IN THE STREETS OF THE CITY.—November 12.

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Hilliard v. George G. Fetter L. & H. Co.

Appeal from Jefferson Circuit Court; Chancery Branch; First Division.

SHACKELFORD MILLER, Judge.

Judgment for defendants, plaintiff appeals—Reversed.

1. Municipal Corporations—Franchises—Power to Grant.—Constitution section 164, provides that no municipal corporation shall grant any franchise or privilege for a term exceeding 20 years, and that before granting such franchise for "a term of years" the municipality shall advertise for bids and award the franchise to the highest and best bidder. Held, That the words "term of years" did not exclude from the operation of the section a franchise for one year, where it involved the use of permanent structures in a street.
2. Same—Ordinance—Licenses.—A city ordinance, imposing an annual license on corporations selling electricity without a franchise from the city, and providing for the issuance of an annual license on application to the board of public works by a corporation desiring to transmit electricity or heat through the streets, in so far as it authorizes a public lighting and heating corporation to transmit electricity and heat through permanent conduits in a street under yearly licenses, is in violation of Constitution article 164, prohibiting cities from granting any franchise or privilege for a term of years without advertising and receiving bids therefor.

W. O. HARRIS for appellant.

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POINTS AND AUTHORITIES.

1. Section 164 of the Constitution forbids any use of the streets of a city, except temporary ones, unless the franchise is purchased at public letting. A masonry conduit in a street is not temporary. (Nicholasville Water Co. v. Councilmen, 18 Ky. Law Rep., 592; Providence v. Providence, 28 Ky. Law Rep., 1015; Merchants v. Citizens' Tel. Co., 29 Ky. Law Rep., 512; People's El. Co. v. Capital Gas Co., 116 Ky., 91; Monarch v. Owensboro, 119 Ky., 939; Frankfort Tel. Co. v. Councilmen, 30 Ky. Law Rep., 885.

2. A tax-payer may maintain a suit to enjoin an illegal use of the streets. (Merchants' v. Citizens' Tel. Co., 29 Ky. Law Rep., 512.)

3. A franchise is an incorporeal hereditament. (1 Blackstone, p. 37.) A widow has dower in it. (Stevens v. Stevens, 3 Dana, 373.)

A. E. RICHARDS and A. B. BENSINGER, attorneys for City of Louisville.

AUTHORITIES AND PROPOSITIONS

1. Sections 1, 2 and 3 of the ordinance, imposing a license tax in addition to an ad valorem tax, is valid. (Constitution, section 181; Ky. Stats., 1906, p. 310, section 245; Shuster v. City of Louisville, 28 Ky. Law Rep., 588; Cumberland Telephone & Telegraph Co. v. Hopkins, Judge, 28 Ky. Law Rep., 846.)

2. Section 4, authorizing the board of public works to issue a permit for the use of the streets for a period of one years, is valid. (Ky. Stats., section 2825; City of Louisville v. Louisville Water Company, 105 Ky., 754; Constitution, sections 163 and 164.)

3. The phrase "for a term of years" means two years or more, and "permits" for a period less than two years are not subject to the provisions of section 164 of the Constitution. ("Words and Phrases," vol. 8; Comth. v. Evans, 33 Mass. (16 Pick.), 450; Ex parte Wm. Seymour, 31 Mass. (14 Pick.), 40; Merchants' Police & District Telegraph Co. v .Citizens' Telephone Co., 29 Ky. Law Rep., 512; Consolidated Gas Company v. Baltimore, vol. 1, New Series L. R. A., 266; Debates on the Constitutional Convention of 1890, vol. 2, p. 2949.)

4. The following cases relied upon by counsel for appellant involve grants which were for an indefinite period and which, as a matter of fact, had been exercised and enjoyed for a longer

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period than two years, and hence same were being operated in palpable violation of section 164 of the Constitution, but in the case at bar it can not be said as a matter of law or as a matter of fact that the permit complained of is enjoyed or exercised for a longer period than one year. (City of Providence v. Providence Electric Light Co., 28 Ky. Law Rep., 115 (the franchise in this case declared void was for a period of six years); Merchants v. Citizens' Telephone Co., 29 Ky. Law Rep., 512 (the court in this case condemned an indefinite grant under which the telephone company had been operating for at least ten years; here again the grant was for a period less than two years, as in the case at bar, but, as a matter of law, was for an indefinite period, and, as a matter of fact, had been operated under for at least ten years); likewise in the other cases cited by counsel for appellant.)

CHAS. H. SHIELDS Attorney for George G. Fetter Lighting & Heating Co., appellee.

The array of authorities referred to by Judge Harris, to-wit, Nicholasville v. Board of Council, 18 Ky. Law Rep., 592; Keith v. Johnson, 27 Ky. Law Rep., 947, and various other cases, were all cases of a gift of a franchise for an indefinite period or for a period of more than two years, each of them directly in conflict with the constitutional provision, and therefore, or course, void.

In conclusion, we ask you to note the ordinance. It provides for a license at a full, fair and complete compensation to the city for the use of its streets or alleys. It is not a gift to any favorite or favored person. It is open to the public to whomsoever wishes to take out a permit. It runs for only a period of one year. The issuing of that license is only in compliance with a permit first obtained from the board of public works. The city retains absolute control of its streets and its alleys. The board of public works has complete and absolute reserved discretion, either to issue or not issue the permit. It can issue it for one year; it can refuse to issue it the next. The ordinance is subject to repeal at any time, and if repealed the permit only lasts to the the end of the year for which it is issued. It is not a right that can, by any possibility, extend beyond the period of one year; it comes within the reserved power left by the Constitution to the municipalities for the proper use and control of their streets for a period less than a "term of years." The bond required by the ordinance to be given before a permit is granted by the board of public works, runs for a period of only twelve months, and at the end of each twelve months, before a new permit is given, a new bond must be executed, and before any license can be

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issued by the sinking fund commissioners there must be exhibited to them a permit issued by the board of public works, and then only under the ordinance can a license be issued to run for one year.

I respectfully submit that the decision of the chancellor sustaining the demurrer to the petition and thus holding that the ordinance was not in violation of section 164 of the Constitution, was right, and that the judgment of the chancellor should be affirmed.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Appellant, alleging that he was a citizen and taxpayer of the city of Louisville, brought this suit against the George G. Fetter Lighting & Heating Company, a corporation, and Charles B. Norton, John H. Weller, and Rudolph F. Vogt, members of the board of public works of the city, seeking to enjoin the board of public works from granting to the George G. Fetter Lighting & Heating Company a permit to construct conduits, manholes, or other permanent structures in the streets of the city of Louisville, for accommodating or carrying electric wires or steam pipes, and to restrain the lighting and heating company from tearing up the streets and constructing therein any wire or wires for the transmission of electricity for heat, or any pipes for the transmission of steam, or from using any conduits placed in or under the streets by other persons or corporations. It is charged in the petition, to which a demurrer was sustained, that George G. Fetter Lighting & Heating Company is a corporation, invested by its charter with the authority to establish and operate a lighting, power, and heating plant, with the right to acquire property necessary for the purpose of erecting, maintaining, and operating plants

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needed in its business, and to furnish, sell, buy, or dispose of electricity or steam for all purposes for which said powers are used; also to operate refrigerating plants for hire for itself and other persons, and to supply customers with heat, light, power, or refrigeration, to locate all connections necessary to make and furnish such supplies, and to do any and all things necessary for the conduct of the business of furnishing, creating, and supplying power, light, heat, and refrigeration by the use of electricity or steam, in the city of Louisville or elsewhere, as it may see fit. It is further stated that by an ordinance enacted by the general council of the city of Louisville, it was provided in section 1 that:

"Each individual, firm or corporation carrying on the business of manufacturing and selling electricity without having a franchise therefor from the city of Louisville shall pay an annual license into the sinking fund of the city of Louisville, the amount of such payment to be one dollar per kilowatt, up to and including two hundred kilowatts, and twenty-five cents for each additional kilowatt of the manufacturing capacity of the machine or machines so used, and an additional annual license of twenty-five per cent. of the amount of the tax above required.

"Sec. 2. The application for said license shall be made to and the same issued by the commissioners of the sinking fund of the city of Louisville, and shall not run for a longer period than one year. Each license issued hereunder shall be made to expire on the thirtieth day of April next after its date. Each individual, firm or corporation required by the provisions of this ordinance to procure a license shall apply for the same on or before May 1st, 1906, and said license shall run for one year from said date."

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"Sec. 4. Whenever any such individual firm or corporation desires to transmit or convey electricity or heat or both through, across or along any designated street, alley or other public way of the city of Louisville, such individual, firm or corporation before applying for the license hereinbefore mentioned shall first apply to the board of public works of the city of Louisville for a permit to so transmit or convey electricity or heat or both through, across or along such designated highway; and the said board of public works may in its discretion grant such permit upon condition that the wires, pipes and other appliances to transmit or convey such electricity and heat shall be placed under the ground under the supervision and in accordance with the plans and specifications furnished by said board, and without any expense whatever to the city; and that the surface of such street, alley or other public way shall be restored at the cost of the applicant to its original condition. Said permit shall be upon the condition that the applicant shall indemnify and save harmless the city of Louisville from any damage to any person or property arising out of the construction, maintenance or operation of the plant, wires or appliances of such applicant; and that it will defend all suits filed and pay all judgments against the city for such damages.

"Sec. 5. Each and every individual, firm or corporation coming within the provisions of section one of this ordinance shall within ninety days after the passage of this ordinance provide and use the necessary and proper machinery and appliances to prevent the emission of soot or dense smoke from any chimney or smokestack of the plant or buildings used in the operation of or in connection with the manufacture, and distribution of heat and electricity. * * *

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"Sec. 6. Whenever any individual, firm or corporation to whom a license has been issued under the foregoing provisions of this ordinance desires to transmit or convey electricity or heat or both through, across or along a street, alley or other public way for which no permit has been issued, such individual, firm or corporation may apply to the board of public works for such permit, which such board may grant upon the same terms and conditions as required for permits under section 4 of this ordinance."

The petition charges that under authority of this ordinance the George G. Fetter Lighting & Heating Company applied to and received permission from the board of public works to transmit or convey electricity and heat by means of underground conduits through, across, and along certain designated streets and alleys of the city, located in the principal business portion of the city; and it avers that the underground conduits referred to consist of a trench or ditch dug in the streets, wherein will be placed a hollow tile and masonry conduit, consisting of one or more ducts or pipes intended to receive the electric wires, and of other ducts intended to receive an insulated steam pipe, that these conduits and other appliances are intended to be and are permanent structures.

The validity of this ordinance is assailed upon the ground that it permits the board of public works to privately grant a franchise or privilege for one year, without advertisement or receiving bids therefor publicly; and hence it is in violation of section 164 of the Constitution, providing that: "No county, city, town or taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege or make any contract in reference thereto

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for a term exceeding twenty-years. Before granting such franchise or privilege for a term of years, such municipality shall first after due advertisement receive bids therefor publicly and award the same to the highest and best bidder; but it shall have the right to reject any and all bids. This section shall not apply to a trunk railroad." Counsel for appellee insist that the ordinance is a valid exercise of the power vested in the general council, and rest their argument upon the proposition that section 164 of the Constitution only applies to a franchise or privilege granted "for a term of years," and contend that, as the ordinance expressly stipulates that the privilege conferred by it shall only be for one year, it is not within the meaning of the Constitution or inhibited by it.

It is manifest, from the reading of the ordinance and the terms and conditions imposed by it, that the structures the George G. Fetter Lighting & Heating Company contemplate erecting or establishing under the permit granted it are intended to be and are permanent. It would be folly to insist that the tearing up of streets in the busiest part of a large city, digging trenches and placing therein masonry conduits for the purpose of receiving the ducts or pipes in by and through which electricity and steam may be conducted, was a temporary enterprise or improvement; and we do not understand that counsel for appellee so contend. Therefore, in considering the question, we will treat the ordinance as attempting to grant a franchise or privilege to erect or establish, maintain, and operate in the streets for one year only a plant intended to be and that is a permanent and enduring structure. Was it within the power of the council to give this franchise in the manner

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provided in the ordinance. We think not. In reaching this conclusion we have not been unmindful of the apprehensions of counsel for appellee that if the privilege to use the streets for a short period or less than a term of years cannot be granted by municipal authorities, except in the manner pointed out in section 164, the delay attending a compliance with this section would prevent cities from givng the right to persons to occupy the streets on any occasion for merely temporary purposes, or else make it so expensive and inconvenient to obtain the right as to render practically useless the authority to grant it. But this section of the Constitution does not contemplate that it shall be necessary to follow its provisions of advertisement, public sale, and award to the highest and best bidder every time a temporary privilege or franchise is granted. Such a construction would be not only impracticable, but absurd, as it would virtually deny municipal authorities the right to grant to an individual or corporation the right to occupy the streets for a day, or a week, or longer, for some temporary purpose, such as the erection of a tent or other structure, or to place material necessary in the erection or repair of buildings, or give other privileges of a like character. There is a wide difference between a temporary and a permanent use, and whether a franchise or privilege is granted or obtained for one, or the other is largely a question of fact, to be determined by the nature, extent, and character of the use for which the street is desired. We take it that there would be no difficulty in the mind of any person in arriving at the conclusion that, if an individual or corporation obtained permission to occupy part of a street while erecting or repairing a building or other

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improvement, like a railroad, telegraph or telephone, a grant of the right for that purpose would be merely a temporary use. And so, if the manager of an amusement company asked permission to place in the streets or public ways tents or booths for the accommodation of the public during the few days his attraction might be in the city, or if on some public occasion it was thought proper to erect a flagpole or suspend wires to aid in celebrating an event. But, if a grant was requested and obtained for the purpose of erecting or establishing a water, heating, or lighting plant, or an instrumentality for the transmission of news by telegraph or telephone, or for the transportation of passengers or property by common carriers, or any other character of enterprise intended for lasting use by the public, or any number of them, there should be no difference of opinion in determining from the nature and use of the property that it was intended to be permanent; and it is this class of franchises that the section was designed to protect.

In an effort to sustain this ordinance, counsel would make the expression "for a term of years" the controlling feature of this section of the Constitution, and it may be remarked that, if it could be upheld at all, it must be upon the ground that the grant is not for a longer time than a year, or rather for less than a "term of years." But these words must be considered in connection with the remainder of the section, and are not entitled to, nor will they be given, the importance attached to them by counsel. The particular thing in the mind of the convention in drafting and considering this section was that the municipalities should derive substantial benefit from the sale of the valuable franchises and

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privileges at their disposal, and that boards and individual officials should not have the power to give them away to favored persons or grant them for an inadequate consideration. It was not contemplated that any person or corporation would desire to purchase or obtain a franchise for the purpose of establishing a permanent and valuable improvement that would expire in one year, or be for a less period than a "term of years;" and these words were inserted merely to give expression to this thought, rather than for any other purpose. Indeed, it does not seem either reasonable or probable that a corporation such as appellee would desire a privilege authorizing it to expend large sums of money in establishing a plant from which no profit could be gained until it was completed and put in operation, unless the right to enjoy it extended over "a term of years." So that in using these words the convention did not intend that the purpose of the section might be evaded by a grant for less than a "term of years," but rather that no grant for a permanent use for less than such term would ever be applied for. Further illustrating the intention of the section, the limitation of 20 years upon the time for which franchises might be granted was added, as what would be an adequate price for a franchise granted to a public utility corporation to use the streets of a city to-day might be a mere pittance 20 years hence. The value to the owners of the right granted would keep pace with the growth, wealth, and population of the city, and unless at some future time the city had the right to obtain additional compensation for the privilege it would give the grantees of the franchise undue advantage, and deny to the city the right to exact a consideration in keeping with the value of the privilege bestowed.

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Keeping in mind the purpose of this section, if such a franchise or privilege as is granted by this ordinance could be given away for one year at a time, the effect would be to destroy entirely the end attempted to be accomplished. The public authorities, in place of disposing of a franchise for two or more years at public sale to the highest and best bidder, could grant it for one year, and at the expiration of that, extend it for another, and so on year after year, without any limitation whatever as to the time. The intention of the section cannot be evaded by this method of procedure, no more than it can be by granting a franchise for an indefinite period, as has been heretofore attempted, but declared invalid by this court in Merchants' Police District Telegraph Company v. Citizens' Telephone Company, 123 Ky. 90, 93 S. W. 642, 29 Ky. Law Rep. 512, in which the court, speaking of the right of the district telegraph company to use the streets for an indefinite length of time, said: "Its right to operate under the franchise or privilege was without limit, except as the city council might see proper to revoke it. This is a clear attempt to evade the provisions of the Constitution." And so in Frankfort Telephone Company v. Board of Councilmen of the City of Frankfort, 125 Ky. 59, 100 S. W. 310, 30 Ky. Law Rep. 885, where the construction contended for here, was denied.

Prior to the present Constitution, the municipal authorities of cities might and did grant valuable rights in the streets and public places to individuals and corporations desiring to use them for private gain. No restrictions were thrown around the granting of these privileges to protect the citizen from the cupidity of a council or the greed of a purchaser of the franchise. As a result, the residents and tax-

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payers of the city found their most valuable streets occupied by corporations who obtained them as a result of personal favor or private traffic, without just, or often any, compensation to the people who owned them. To remedy the notorious and often scandalous wrongs perpetrated by municipal boards and authorities, this section was enacted, and the rights of the public attempted to be safeguarded and protected by requiring that no franchise or privilege intended to be permanent should be granted, except to the highest and best bidder after due advertisement and public award. The board of public works has under the charter of the city control of its streets and public ways, and if the large power delegated by this ordinance was lodged in them, the worst evils intended to be cured by section 164 would be revived. There would be annually, we might say continually, suspended before the eyes of this board the temptation to grant favors to this one and refuse them to that, to reward friends and punish enemies, and even more pernicious would be the opportunity afforded to derive personal gain from the dispensation of these rich favors. This ordinance violates, not only the letter, but the spirit, of the Constitution. If it is valid, section 164 is a dead letter, and has no place in the organic law of the State. Its attempted evasion is as palpable as was the effort to ignore it by granting franchises for an indefinite period.

Although the precise question here involved has never been directly presented, this court, in the few cases that have come before it, has endeavored to preserve the usefulness of this section by carrying out its manifest purpose. Nicholasville Water Co. v. Board of Council of Nicholasville, 36 S. W. 549, 38 S. W. 430, 18 Ky. Law Rep. 592; City of Providence

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v. Providence Electric Light Co., 122 Ky. 237, 91 S. W. 664, 28 Ky. Law Rep. 1015; People's Electric Light & Power Co. v. Capital Gas & Electric Light Co., 116 Ky. 76, 75 S. W. 280, 25 Ky. Law Rep. 327; Monarch v. Owensboro City Ry. Co., 119 Ky. 939, 27 Ky. Law Rep. 380, 85 S. W. 193; Keith v. Johnson, 109 Ky. 426, 59 S. W. 487, 22 Ky. Law Rep. 947. And especially were the views herein expressed supported in Frankfort Telephone Co. v. Common Council, supra, where it was aptly and with great pertinency to this case said: "It is earnestly insisted that section 164 does not require a franchise for less than a term of years to be sold in order to be valid. In other words, it is urged that the municipality can permit the corporation to exercise a franchise for any length of time, provided it does not bind itself to continue this permission for more than a year. To this we cannot agree. The framers of the Constitution intended by section 164 to take it out of the power of municipalities to give away franchises to do business within their boundaries. * * * It would open up a way for the commssion of a large part of the evils intended to be corrected by the section under discussion, to construe it so as to permit cities to give away long franchises simply by failing to state in the ordinance by which they are given that they shall exist for a term of years."

The argument is made that this ordinance prevents monopoly by allowing the city to grant to any individual applying therefor the right to establish and maintain lighting and heating plants for the use of the public, and that in this respect it accomplishes a useful purpose and one in keeping with the spirit of our laws. We are not impressed with the force of this reasoning. Aside from the fact that the recog-

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nition of the validity of this ordinance would do violence to the Constitution, there is no obstacle in the way of the city granting to any number of persons who desire to purchase franchises the privilege of establishing any number of plants for distributing heat and light, and this without interference or domination by other persons engaged in the same business. This was expressly decided in Stites v. Norton, 125 Ky. 672, 101 S. W. 1189, 31 Ky. Law Rep. 263, where it was held that the city had the right to refuse to allow the Louisville Lighting Company to bid for a franchise to manufacture light.

Briefly stated, our conclusion is that municipal authorities cannot grant a franchise or privilege for a use intended to be permanent, except in the manner pointed out in section 164; nor can this section be evaded, or its purpose nullified, by making the grant for an indefinite period, or for less than a "term of years," or by any other scheme or device. If it should ever occur that a person or corporation desired to obtain for a year, or less than a term of years, a franchise or privilege for a use intended to be permanent, and the city authorities were disposed to grant the request, then the forms prescribed in the section must be followed.

Wherefore the judgment is reversed, with directions to enter a judgment in conformity to the prayer of the petition.

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CASE 14.—ACTION BY GILSON PERKINS AGAINST THE CHESAPEAKE & OHIO RY. CO. FOR DAMAGES FOR PERSONAL INJURIES.—November 13.

C. & O. Railway Co. v. Perkins

Appeal from Lawrence Circuit Court.

M. M. REDWINE, Circuit Judge.

Judgment for plaintiff, defendant appeals—Affirmed.

1. Witnesses—Compentency—Testimony of Persons Interested for or Against a Decedent.—In an action against a railroad for injuries to plaintiff's intestate in attempting to cross its track, plaintiff administrator, who was also intestate's son, was not excluded from testifying as to the injuries sustained by intestate, by Civil Code Prac., section 606, subsection 2, prohibiting a person to testify for himself concerning any transaction with a decedent.
2. Appeal—Review—Harmless Error—Admission of Evidence.—Where, in an action against a railroad for injuries to plaintiff's intestate in attempting to cross its tracks, there was ample testimony as to the injuries sustained by intestate other than that of plaintiff administrator, who was also his son, the admission of plaintiff's testimony to the same facts, to which there was no material contradiction, was not prejudicial error, even if its admission could be regarded as erroneous under Civil Code Practice, section 606, subsection 2, prohibiting a person to testify for himself concerning any transaction with a decedent.
3. Same.—Though, in an action against a railroad for injuries to plaintiff's intestate in attempting to cross its track, it was incompetent for a witness to express his opinion that he thought he could have heard the engine bell if it had been ringing, such testimony was not prejudicial, where the witness had theretofore stated that he did not hear the bell or other signal, and the expression of opinion was forced from him by unnecessary questioning.

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4. Same—Reservation and Presentation of Error—Objection and Exception to Evidence.—Error, if any, in the admission of evidence, is not available where no objection was made on the trial or exception taken.
5. Abatement and Revival—Death of Plaintiff—Actions for Personal Injuries—Recovery for Permanent Impairment of Earning Capacity.—Where plaintiff in an action for personal injuries died, and the action was revived by his administrator, such administrator was entitled to recover for the permanent impairment of his intestate's power to earn money.
6. Railroads—Injuries to Person on Track—Injury Avoidable Notwithstanding Contributory Negligence—Evidence.—Evidence, in an action against a railroad for injuries to plaintiff's intestate in attempting to cross its track, held to warrant a finding that if the usual signals had been given of the backing of the train, and proper lookout maintained by the engineer and fireman, the train, notwithstanding any negligence of intestate, might have been stopped by ordinary care in time to prevent striking him or at least immediately after striking him and before dragging him the distance he was dragged.
7. Trial—Instructions—Construction of Charge as a Whole.—Where, in an action for injuries to plaintiff's intestate in attempting to cross a railroad track, the care necessary to be exercised by intestate was sufficiently expressed by the instructions as a whole, it was not error that a certain instruction did not in express terms define the care required of him.
8. Appeal—Review—Harmless Error—Argument of Counsel.—Though a statement by plaintiff's counsel in his argument, in an action against a railroad for injuries to plaintiff's intestate in attempting to cross its track, that the railroad owed the "highest care," did not properly state the law, it was not prejudicial where the jury was admonished by the court respecting the same and properly instructed as to the care required.

W. H. WADSWORTH and LeWRIGHT BROWNING, attorneys for appellant.

F. T. D. WALLACE of counsel.

POINTS AND AUTHORITIES.

1. One who is an administrator and heir of a decedent, can not

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testify concerning transactions with, or acts done or omitted to be done, by the deceased. (Civil Code Prac., section 606, subsection 2; Northrip's Admr. v. Williams et al., 100 S. W., 1192; Warren Deposit Bank v. Younglove, 66 S. W. 749, 112 Ky. 667; Turner v. Mitchell, 61 S. W., 468; Stagg Co. v. Taylor, etc., & Sons, 66 S. W., 862; Elliott v. Campbell, 78 S. W. 1122, 117 Ky. 719; Townsend et al. v. Wilson et al., 71 S. W. 440, 114 Ky. 504; Hobbs v. Thomas, 79 Ky., 61; Witt v. Thomas, 42 S. W., 338; Doty's Admr. v. Doty's Guardian, 80 S. W., 803.)

2. It was error to permit witness to testify as to whether or not he could have heard the bell, that question being for the jury. (Eskridge's Exr. v. Cincinnati, etc., Ry. Co., 12 S. W. 580, 89 Ky. 367.

3. Plaintiff having in his petition set out specifically the injuries complained of, it is error to admit evidence of other injuries. (Chesapeake & N. Ry. Co. v. Hanmer, 66 S. W. 375.)

4. Instruction "1," as given, is erroneous in that it authorizes the jury to award damages for permanent injuries to appellee's intestate. (Ky. Stats., sections 6 and 10; Newport News, etc., R. Co. v. Dentzel's Admr., 14 S. W., 959; Hansford's Admr. v. Payne & Co., 14 Bush, 380.)

5. Instruction "2," on contributory negligence, is erroneous in part, because unsupported by the evidence. (L., H. & St. L. Ry. Co. v. Jolly's Admr., 90 S. W., 977; Ill. Cent. R. Co. v. Vinson, 74 S. W., 671; Bardstown v. Nelson County, 90 S. W., 246; C., N. O. & T. P. R. Co. v. Cecil, 90 S. W., 585; So. Ry. Co. v. Scanlon, 92 S. W., 827.)

6. Instruction "3," as given, is erroneous, because it sets forth only the duties owed by appellant. (Louisville & N. R. Co. v. Cummin's Admr., 63 S. W., 594.)

7. It was error for the trial court to refuse to instruct the jury to disregard certain improper argument made by appellee's counsel. (L. & N. R. Co. v. Cummin's Admr., supra; Railway Co. v. Barbour, 51 S. W., 159; Railway Co. v. Gunter, 56 S. W., 527; Ky. Stats., section 786; L. & N. R. Co. v. McCandless, 93 S. W., 1041.)

JOHN W. WOOD and GREENE & VANWINKLE, attorneys for appellee.

AUTHORITIES CITED.

1. There was no error in the admission or rejection of testimony by the trial court. (Civil Code, section 605; Garrard Co. Court v. McKee, 74 Ky. (11 Bush), 234; Newport St. Ry. Co. v. Johnson, 2 Ky. Law Rep., 225; Cin. O. & S. W. Ry. Co. v. Hogan, 16 Ky.

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Law Rep., 444; Louisville & C. Packet Co. v. Samuels' Admr., 59 S. W., 3; Jackson-Vanarsdell Dist. Co. v. Moore, 61 S. W., 368.)

2. Instructions given by the trial court are correct. (Perkins v. C. & O., 94 S. W., 637; Ky. Stats., section 10; L. & N. Ry. Co. v. Logsden, 71 S. W., 905; L. & N. Ry. Co. v. Hall, 74 S. W., 280; L. & N. Ry. Co. v. Sights, 89 S. W., 132.)

(b) Ill. Cent. Ry. Co. v. Murphy, 97 S. W., 729; Crowley v. L. & N. Ry. Co., 55 S. W., 434; L. & N. Ry. Co. v. Taylor's Admr., opinion October —, 1907.

(c) L. & N. Ry. Co. v. Cooper, 65 S. W., 795; Board of council, etc., Harrodsburg, v. Mitchell, 78 S. W., 210.

3. Argument of counsel was not prejudicial to appellant. (City of Covington v. Glennon, 2 Ky. Law Rep., 215; Ill. Cent. Ry. Co. v. Whittaker, 57 S. W., 465; L., H. & St. L. Ry. Co. v. Morgan, 62 S. W., 736; City of Owensboro v. Knox's Admr., 76 S. W., 191; Lou. Ry. Co. v. Sheehan, 85 S. W., 688.)

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This is the second appeal in this case. On the first appeal, which was prosecuted by the original plaintiff, Gilson Perkins, the judgment of the circuit court was reversed because of error committed by that court in peremptorily instructing the jury to find for the defendant. See Perkins v. Chesapeake & Ohio Railway Co., 94 S. W. 636, 29 Ky. Law Rep. 660. As the opinion on the first appeal contains a full statement of the facts constituting the tort complained of by Perkins, it is only necessary to say here that the action was instituted by him to recover of appellantdamages for injuries he sustained by the alleged negligence of the servants of the latter in running an engine and tender over and dragging him, at Ashland, Ky. The answer of appellant denied the negligence complained of, and alleged contributory negligence on the part of Perkins, which was denied by reply. After the reversal, adjudged on the first appeal, Gilson Perkins died intestate, and the action

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was thereupon revived, and the prosecution thereof, continued in the name of his son, Wm. Perkins, as administrator. On the last trial the jury returned a verdict in behalf of the administrator for $1,375, upon which judgment was duly entered by the court. Appellant asked a new trial, which was refused. Hence the present appeal.

The grounds filed in support of the motion for a new trial, and now urged for a reversal are: (1) That the lower court erred in allowing certain evidence to be introduced by appellee; (2) that the court also erred in instructing the jury; (3) that counsel for appellee was allowed by the court, over appellant's objection, to make an improper argument to the jury.

A part of the alleged incompetent evidence complained of was the statements of the administrator, Wm. Perkins, as to the character and extent of the decedent's injuries; it being the contention of the appellant's counsel that the testimony in question was as to transactions with the decedent, and, in addition, that, as Wm. Perkins was an heir at law of the decedent, and therefore a party in interest, he was not a competent witness under subsection 2, section 606, Civil Code Prac. The administrator was not excluded from testifying by the provisions of the Code, supra, for he was not testifying in his own behalf against the estate of the decedent, nor did his testimony relate to any transaction with the latter. It only went to show the injuries sustained by the decedent at the hands of appellant's servants, and the nature and extent of his suffering, mental and physical, resulting therefrom. In brief, the witness was just as competent to testify to the facts furnished by him as would have been any other witness who was

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not the administrator or an heir at law of the decedent. An examination of the several authorities relied on by appellant will show that they do not sustain his contention. The witnesses whose testimony they pronounce incompetent were parties in interest endeavoring to fasten liability upon the estate of the decedent in satisfaction of demands alleged to be due them from the estate of the decedent. Hence the testimony offered as to any verbal statements of or transaction with the decedent, whose estate it was sought to charge, were incompetent. But, waiving further discussion of the matter, it is sufficient to say that, if the admission of the testimony of Wm. Perkins could be regarded as error, it was not prejudicial to appellant, for ample testimony as to the same facts given in evidence by him was furnished by at least one other witness, and as there was no material contradiction of his testimony, or that of the other witness, no presumption will be indulged that his failure to testify would have strengthened the defense interposed by appellant, or lessened the amount of the verdict. L. & N. R. R. Co. v. Lucas' Adm'r, 98 S. W. 308, 30 Ky. Law Rep. 359; Barkley v. Bradford, 100 Ky. 304, 38 S. W. 342, 18 Ky. Law Rep. 725.

Appellant also complains that the witness Sharp, who was present when the decedent was injured by appellant's cars, was allowed to express the opinion that he thought he could have heard the engine bell, if it had been ringing. This testimony, though incompetent, was not prejudicial, as the witness had theretofore stated, in substance, that he did not hear the bell or other signal of the approach of the engine and cars. The after expression of opinion was but a conclusion forced from him by a series of unneces-

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sary questions and the manner in which they were put.

The further complaint of appellant that Dr. Hudgins was asked as to whether any injury resulted to the decedent's lungs from being run over by the cars, when no injury to those organs had been alleged in the petition, was doubtless inadvertently made, for the witness, in answer to the question, said there was no injury to the lungs. Besides, the record fails to show that the appellant objected to the questions asked Hudgins on that point, or that it took an exception to them.

It is insisted for appellant that instruction 1 erroneously stated the measure of damages, in that it authorized the jury, if they found for appellee, to compensate him for any permanent impairment of the power of his decedent to earn money that may have been caused by his injuries. We do not think this was error. As before stated, the action was brought by the decedent before his death to recover for the injuries sustained. He was injured in April, 1903, but did not die until October, 1905. The action survived to the administrator and was revived in his name; there was no change of the cause of action after the revivor, and as, according to the evidence, the decedent's injuries caused an impairment of his power to earn money, and such impairment continued during the 2½ years intervening between the date of the infliction of the injuries and his death, we know of no rule of law or reason that would prevent his administrator from recovering for the impairment of his power to earn money existing during that time. In a case like this the recovery should include compensation for physical and mental suffering, reasonable surgical bills for effecting or endeavoring to

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effect a cure, value of time lost, and any permanent impairment of the power of the person injured to earn money during the remainder of his life. The measure of damages, as here indicated, is contained in the instruction complained of. It is not therefore open to the objections made by appellant.

To instruction 2, which defined contributory negligence and advised the jury in what way it would prevent a recovery, the court added the following words: "Unless the jury further believe from the evidence that the defendant's servants in charge of the engine and cars, before the injury, discovered, or by the exercise of ordinary care could have discovered, the perilous situation in which plaintiff's intestate's negligence had placed him, and thereafter failed to observe reasonable care to avoid the injury which followed, in which event the law is for the plaintiff, and the jury will so find." Counsel for appellant insist that the foregoing addition to instruction 2 was wrong, because there was not evidence upon which to base it. In this we think counsel err. There was evidence conducing to prove that the engine and tender by which appellee's intestate was injured was backing east at the slow rate of five miles an hour at the time it struck him, and that when the latter left the restaurant to take passage on one of appellant's trains, then about to leave the depot he walked, as all persons were accustomed and licensed to go, eastwardly on a diagonal course, taking five or six steps to reach the first railroad track and six or seven steps along the track, at this juncture the tender of the engine struck and threw him down, but, catching with his hands the board at the end of the tender, he was dragged 125 feet before the engine was stopped, There was also evidence tending to prove

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that in approaching the track the intestate looked east, in which direction there was no train in view, and that just before in crossing over to the restaurant he looked to the west, in which direction the track was clear for a long distance; that during the brief time he was in the restaurant the engine and tender, by which he was struck, with seven cars attached, were switched upon this track, and backed east with a tender in front, but with no one standing on the tender board to keep a lookout; that no signals from the bell or whistle of the engine were given to warn the decedent of the approach of the train, and neither the engineer or fireman was keeping a lookout ahead of the backing train. In view of this situation, and the further clearly established fact that the train could have been stopped within 20 or 30 feet, it can safely be said that there was evidence conducing to prove that, if the usual signals had been given of the backing of the train, and proper lookout maintained by the engineer and fireman, the train, notwithstanding the decedent's apparent negligence in getting on the track as he did, might by ordinary care have been stopped in time to prevent its striking him, or, at any rate, been stopped immediately after striking and before dragging him a distance of 125 feet, and thereby have prevented some part of his injuries. Manifestly, no effort was made after the decedent was struck to stop the train short of 125 feet, though the attention of those in charge of it was called to his peril by a person from the restaurant after he was struck. It would seem therefore, that, if they had been keeping a lookout, they would at least have seen the decedent struck by the train and prevented his being dragged the distance he was.

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This being true, it cannot be said that the addition to instruction 2 was unauthorzed by the evidence.

Appellant's contention that instruction 3 was improper because it did not, in express terms, define the care required of the decedent, on the occasion of receiving his injuries, as well as that required of appellant's servants in charge of the train, is without merit, for the care necessary to be exercised by the former was sufficiently expressed by the instructions as a whole.

Equally untenable is the objection to the statement made by the appellee's counsel in argument to the jury to the effect that appellant owed the "highest care to Gilson Perkins." While the remark did not properly state the law in respect to the care required of appellant toward the decedent as its effect was counteracted by the court's admonition given the jury and the instructions as to the degree of care required, the statement could not have been prejudicial.

The judgment is therefore affirmed.

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CASE 15.—ACTION BY THE CITY OF FLEMINGSBURG AGAINST FLEMING COUNTY FOR A PORTION OF THE COST OF A BRIDGE.—November 14.

City of Flemingsburg v. Fleming County

Appeal from Fleming Circuit Court.

J. P. HARBESON, Circuit Judge.

Judgment for defendant, plaintiff appeals—Reversed.

1. Bridges—Highways—"Bridges."—Though the word "bridge" is used in every chapter and in almost every section of the statutes relating to highways, a distinction has always been made between bridges and other portions of the highway; the word "bridge" not being equivalent to or included in the term "highway."
2. Same—Cost of Construction—Division Between City and County.—Where a bridge, over a creek running through a city of the fifth class and wholly within the city limits, connected two portions of a street, which was also a principal county highway, was necessarily rebuilt by the city after the county refused to contribute, the city was entitled to recover from the county a fair portion of the cost of a reasonably safe bridge convenient for public travel, to be determined on the basis of the population and wealth of the county and the county travel over the bridge as compared with the population, wealth and travel by the inhabitants of the city.

Chief Justice O'Rear, and Judges Nunn and Settle dissenting.

J. B. CUMBER, attorney for appellant.

O. F. BRIGHT, City Attorney, of counsel.

The Kentucky Legislature having had the whole matter before it, in considering the municipal corporation act, and having delegated the power to build and repair and control bridges to the larger cities—cities of the first four classes—and having withheld

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that power from the smaller cities—the cities of the fifth and sixth classes—in order to do justice and equity to these smaller towns, in order to give them some small return out of the annual bridge tax exacted by the county, in order to make the taxes in some measure fair and uniform, in order to apply the Golden Rule—the foundation stone of all equity—between the citizens of smaller towns and the citizens of the county outside of the towns, and to apportion to each its share of the burdens and benefits of this taxation, the court has only to declare the law as it is written: That the county must build and repair all public bridges within its boundary, unless that duty is imposed by direct language on some other division or sub-division of the State; that the Legislature has imposed this duty on cities of the first, second, third and fourth classes, but that it has not, either by direct language, or by fair inference, imposed such duty on cities of the fifth and sixth classes.

AUTHORITIES CITED.

4 Am. & Eng. Ency. (2d Ed.), 936 920; St. L., A. & T. R. Co. v. People, 200 Ill., 365; State v. Canterbury, 28 N. H., 195-231; Ky. Stats., section 2825; Ky. Stats., section 3058, subsection 5; Ky. Stats., section 3119; Ky. Stats., section 3290, subsection 7; Ky. Stats., section 3583; 69 S. W. R., 726; Ky. Stats., section 3643; Hood v. Trustees of Lebanon, 12 Ky. Law Rep., 813; Town of Paintsville v. Comth., 21 Ky. Law Rep., 1634; Lesley County v. Wooten, 75 S. W. R., 208; Ky. Stats., sections 1851 and 2744.

ALVIN KENDALL, County Attorney; W. G. DEARING and B. S. GRANNIS, attorneys for appellee.

We submit that the bridge in controversy was never a part of the highway of the county nor of any private corporation, but has always been considered by the city as a part of its street, maintained and controlled by it, with no thought of the county having any responsibility in regard to it, until the growing needs of the town and the desire to have the street at this point wholly closed for the convenience of the business houses flanking it on both sides made necessary, and an expensive structure, which they seek to foist upon the county under some strange and technical construction of the statute. Certainly to hold the county liable for the expense of this bridge, it should have the power to decide what sort of bridge should be built and also be charged with liability for its care, when it can not exercise any police care over it or to have the duty or right to keep it lighted or to

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control its use in any way. That it was built with the city's convenience in view, and for the city's use, must be apparent.

CASES CITED.

Town of Paintsville v. Comth., 21 Ky. Law Rep., 1634; Danville, etc., v. Fiscal Court, etc., 21 Ky. Law Rep., 196; City of Chicago v. Powers, 89 Am. Dec., 419; Erie v. Schwingle, 60 Am. Dec., 87; 4 Am. & Eng. Ency., 920, 927; Leslie County v. Wootten, 25 Ky. Law Rep., 217.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Flemingsburg, a city of the fifth class, has a population of about 1,100, and is situated on a creek that runs entirely through the city. Crossing this creek on a bridge within the city limits is one of the principal highways of the county, which is also used as a street of the city. It does not appear in the record whether this bridge was originally erected by the county or city or a turnpike company; but for the past 15 years the city has been exercising control over it and keeping it in repair. In 1905 the bridge became unsafe and dangerous for public travel, rendering it necessary to erect a new structure. Conceiving that it was the duty of the fiscal court to rebuild or erect a new one, the city council demanded that the fiscal court do this work. The court declined to do so, upon the ground that, as the bridge was entirely within the city limits, it was the duty of the city to repair or rebuild it. Thereupon the city did erect a new bridge that cost, as is averred, $3,065. and sought in this action to recover from the county of Fleming this sum. A demurrer was sustained to the petition, as well as to an amended petition, and, declining to further amend, the city prosecutes this appeal.

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In considering the question involved, we must accept as true the averments of the petition, which are in part: "That one of the principal highways and thoroughfares of Fleming county runs from the southeastern boundary to the northeastern boundary of said county and passes through the corporate limits of said city of Flemingsburg and over the town branch by means of a bridge, which bridge is within the city limits; that on the south side of said bridge, about 100 feet from said bridge and on this highway, is situated the railroad depot and also the public graded school, and on the northeastern side of said branch and on said thoroughfare, and within 250 yards of said bridge, are situated the public buildings of Fleming county, composed of the courthouse, clerks' offices, and the jail; that it is necessary for persons residing in the southern and eastern portion of said county to cross by means of this bridge in order to attend court and visit the public buildings of the county, and it is also necessary for persons residing on the north and east side of the said town branch and bridge to cross the bridge in order to reach the railroad depot and public school." It was further averred that the price paid for the construction of the bridge was reasonable, and that it was of such a size and kind as was required to accommodate the general traveling public. This court has had occasion to consider questions somewhat similar to the one here presented, the latest being that of Nelson Co. v. City of Bardstown, 124 Ky. 636, 99 S. W. 940, 30 Ky. Law Rep. 870, where the bridge in controversy was situated at the boundary line of the city on one of the leading thoroughfares of the county; and this court there said: "The bridge in question is on a thoroughfare traveled by a large portion of the

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inhabitants of the county in reaching the county seat and the railroad station. It is essentially a county bridge, and indispensable for the use of the county, and is such a structure that the fiscal court should maintain. It is entirely outside of the settled portion of the city. It is not necessary for city purposes. It is only nominally to any extent within its boundary, and, under the principles of the opinion cited, should be maintained by the fiscal court. It is incumbent on the fiscal court to build such bridges in the county as the county requires; and the citizens of the town will not be required to build a bridge for the county, though it may be located within the town. The entire burden of building and maintaining a bridge on a county highway, though wholly within the boundaries of a town, has been placed on the county, where, from the size of the town, the character of the bridge, the travel over it, and other circumstances, this was just and right. But ordinarily, where a bridge is within a city, and is necessary for the city travel as well as the traveling public of the county, as between the public and them, the burden rests on both the city and county, and should be apportioned between them in the proportion that the travel over the bridge within the city bears to the travel over it or from the county outside the city. If they cannot agree upon it, then either may rebuild or repair the bridge when necessary and recover from the other its proportion of the cost. Culverts or such small bridges as are essentially a part of the street should be built and maintained by the city; but bridges which span streams and are not fairly a part of the street rest on a different ground, when they are for the common benefit of the people of the city and the people of the county outside of the city." The only

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difference between the facts of that case and the one at bar are that there the bridge was on the boundary line of the city, while here it is entirely within the city limits. And in the course of the opinion the court unqualifiedly holds that in certain cases it would be proper to require the county to construct or to aid in the construction of a bridge, although it might be entirely within the city limits. This doctrine was expressly declared in Leslie County v. Wooten, 115 Ky. 850, 75 S. W. 208, 25 Ky. Law Rep. 217, in which it was held that the fiscal court might be compelled by mandamus to erect a bridge located within the corporate limits and upon one of the public highways of the county.

The real question is: Is the bridge upon one of the thoroughfares or highways of the county, and is it necessary for the use of the people of the county in going to and from the public places and buildings within the county? If so, the county, in cities the size of Flemingsburg and smaller towns, should be required to bear its proportion of the expense of maintaining the bridge or erecting a new one. In large cities, where bridges are necessary more for the convenience of the inhabitants of the city than the people of the county generally, and the cities by reason of the population and wealth are financially able to erect such bridges as may be required, the county will ordinarily not be compelled to erect or contribute to their erection; but it is a matter of common knowledge that in a large number of the smaller towns of the State the main streets are parts of the public highways of the county, and are used as much, if not more, by the people of the county than they are by the inhabitants of the city; and in such cases, where bridges are needed as parts of

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the public highways, the county should be required to erect or contribute to their erection. Whether the county should bear the whole or only a proportionate part thereof must be left to be determined by the facts and circumstances of each case. It is not practicable to lay down any hard and fast rule. Thus, in Leslie county v. Wooten, 115 Ky. 850, 75 S. W. 208, 25 Ky. Law Rep. 217, the county was required to bear all the expense of erecting a bridge upon a public highway and street within the corporate limits of the town of Hyden, upon the ground that the town was not financially able to erect a bridge, and that a bridge was necessary for the convenience of the traveling public of the county.

In this connection, and throwing light upon the policy of the Legislature as to requiring the larger cities to erect and repair at their own expense bridges, it is worthy of some, but not controlling, notice that in the charters of cities of the first, second, third, and fourth classes provision is expressly made for the construction and repair of bridges (Ky. Stats. 1903, sections 2825, 3058, 3119, 3290); whereas, in the charters of cities of the fifth class and towns of the sixth class, the word "bridge" is not mentioned. It might therefore be inferred that the Legislature intended to impose on cities of the first, second, third, and fourth classes the duty of erecting and repairing bridges within the city limits; whilst the county might be required in whole or in part to erect and repair bridges in cities of the fifth class and towns of the sixth class. It is true that in Town of Paintsville v. Com., 55 S. W. 915, 21 Ky. Law Rep. 1634, it was held that a town of the sixth class could be indicted and punished for failing and refusing to keep in repair a bridge on a street of the town for an

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unreasonable length of time; but in that case the question was not made or determined as to the duty of the county to contribute in whole or in part towards the erection of a new bridge or the repair of an old one. Nor does the fact that a town of the sixth class might be liable to indictment as for a nuisance in failing to provide for the repair of a bridge within the town limits, or made to respond in damages for injuries sustained by a traveler, conflict with the proposition that the town may require the county to erect or repair the structure complained of. As the town authorities could by taking proper action require the county to contribute in whole or in part as the facts might justify to the erection or repair of the structure, the town will be liable for negligence in this respect, as it would be for negligence in other matters connected with the streets and highways of the town. City of Chicago v. Powers, 42 Ill. 169, Am. Dec. 418.

The question involved in this case is of general importance, and the conclusion we have reached not free from difficulty. On the one hand, it is pressed with force that the fiscal court is charged by law with the conduct and management of the fiscal affairs of the county and the construction and repair of its highways and bridges, and that the discretion vested in it by the Legislature in matters of this character and others affecting the general welfare of the county ought not to be controlled or directed by boards of council or other municipal officers; that the cities and towns in the State are also corporations created by law, having the exclusive control of the streets and public places within the corporate limits; that, as the fiscal court cannot interfere in the governmental affairs of cities and towns, or

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direct the governing authorities what improvements they shall make or how to make them, neither should the legislative boards of these municipalities be permitted to dictate to the fiscal court the manner in which it shall manage the affairs of the county. As an illustration of the evils that may result from permitting cities and towns to burden the county with heavy or unnecessary taxes without the consent of the fiscal court, the case before us is effectively cited. Here the city of Flemingsburg has constructed an expensive bridge crossing a small creek in the center of the town, and seeks to charge the whole cost of its construction upon the people of the county, although the agents whom the county has selected to govern its affairs had no voice in the erection of the bridge, or the amount that should be expended; and we are not unmindful of the danger attending a rule that might enable cities and towns to erect costly structures and charge the people of the county with the cost thereof.

On the other hand, it is urged that, although cities and towns are separate municipalities, invested with certain rights and powers, they are nevertheless a part of the county, the inhabitants being required to contribute to all expenses incident to county affairs, includng the construction of highways and bridges, and in addition to this are burdened with the expense of maintaining the municipal corporation in which they reside. Therefore it is said that when a structure such as a bridge, although situated within a town or city, is needed as much, if not more, for the use and benefit of the people of the county, than it is for the inhabitants of the city, and is located on one of the public highways of the county and the city, the county should be required to contribute its share

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of the expense of erecting or keeping it in repair, as it is a part of one of the highways of the county, the same as if located outside the town limits, and the fiscal court under the statute is charged with the duty of maintaining it. And this view has received the approval of this court in three cases in which the question has been presented. It is true that a bridge located in a street is a part of it, and that it is the duty of cities and towns to provide for the construction and maintenance of their streets, and the county cannot be required to contribute anything to their improvement; but it does not necessarily follow from this that the county is also exempt from repairing or constructing a bridge which is a part of the street. Bridges do not fall in the same category as streets or roads. It is true that they are a part of the street or road; but a distinction has always been made between bridges and other portions of the highway, and is recognized in every chapter and in almost every section of the Kentucky Statutes treating of highways. The words are not equivalent and do not mean the same thing. St. L., A. & T. R. v. People, 200 Ill. 365, 65 N. E. 715; State v. Canterbury, 28 N. H. 195.

Having well in mind the troublesome nature of the question before us, and the difficulty in laying down any rule that will be equitable and fair to the people and taxpayers of the city and county, yet our conclusion is that the judgment of the lower court dismissing the petition was erroneous, and that the county should be required to contribute its fair proportion towards the expense needful to be incurred in erecting such a bridge across this stream as might be safe and sufficient for public travel. What proportion of the cost of such a structure should be borne

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by the city and county we cannot on the record before us determine. This question must be decided by the lower court upon a rehearing of the case with all the facts before it. A city or town will not be permitted to erect a more expensive structure than is necessary for safe and convenient public travel, and charge the county with any part of the cost thereof over and above the amount necessary to erect a safe and sufficient bridge. If the bridge erected by the city cost more than was necessary to erect a structure safe, sufficient, and convenient for public travel, the city alone must bear the burden of this to the county's unnecessary expense. The county will only be required to pay its fair proportion of the cost of such a bridge as is herein indicated. This proportion must be determined by the lower court upon due consideration of the population and wealth of the county as compared with the population and wealth of the city, taken in connection with the proportion of travel over the bridge by the inhabitants of the city as compared with the travel over it by the people of the county.

Wherefore the judgment of the lower court is reversed, with directions to proceed in conformity with this opinion.

Chief Justice O'Rear, dissenting. Conceiving that the majority opinion in this case has gone too far, I feel constrained to dissent, and in deference to that opinion of the public who may be concerned in a further investigation of the matter I will submit the reasons upon which I base this action.

It is to be noted in the first place that the liability adjudged is one of implied assumpsit by a municipal corporation against a county. Heretofore it has been understood that such actions do not lie; that the

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county is an integral part of the State government, and is not liable to a suit, except by express authority of a statute or by necessary implication of a statute. It could not be sued at all at the common law. Nor is it a fact that the city of Flemingsburg has the right under any statute to incur a debt against the county. The public highways of a county are under two bodies of control, namely, those in the city of the city authorities, and those in the county of the county authorities. Each is answerable for the condition of the highways committed by statute to it, respectively. The majority opinion is rested upon the authority of three previously adjudged cases in this court, namely, a manuscript opinion delivered in the case of Trustees of Elizabethtown v. Hardin County, filed February 9, 1877, Leslie County v. Wooten, 115 Ky. 850, 75 S. W. 208, 25 Ky. Law Rep. 217, and Nelson County v. City of Bardstown, 124 Ky. 636, 99 S. W. 940, 30 Ky. Law Rep. 870.

Elizabethtown v. Hardin County and Leslie County v. Wooten may be regarded as deciding the same question. Both of these cases are rested upon a statute which expressly requires the fiscal courts of a county to repair public bridges within the county and forming a part of the county highways. In each of the cases a mandamus was sought against the fiscal court to put it in action and to require it to perform a plain statutory duty about which it had no discretion, except as to the character of repairs it had to make upon the bridge and the amount of money that it might elect to spend therefor. Accepting the proposition as settled and as sound that the writ of mandamus will issue at the instance of any interested suitor against the fiscal court of a county to require it to execute an express public duty, still neither of the

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cases cited intimate that anybody else than the fiscal court could either execute the statutory duty or exercise a discretion as to the manner of its execution. It is far beyond anything hinted at in either of the cases to hold that the judgment and discretion of a judical officer, of a circuit judge, or of an appellate court, could be substituted in such matter for that vested by the Legislature in the county governing body known as the "fiscal court." In each of the cases alluded to the fact was that within the corporate limits of a town was a bridge which constituted a material and essential part of a county highway. It had been erected in whole or in part by the county, and had been maintained by it. The court held that bridges within the town, constituting essential parts of the county system of highways, should be maintained by the county at large. In Leslie County v. Wooten it is recited: "It appears that the fiscal court has heretofore ordered all the work which has been done in keeping this road in repair, and for this purpose has appointed overseers year after year. Under the authority above cited (Elizabethtown v. Hardin County) we have reached the conclusion that the bridge constitutes a part of the county road, and that it is the duty of the fiscal court to rebuild it." The court then reviewed the authorities holding that the statute imposed expressly upon the fiscal courts the duty to repair county bridges, and that such duty was one that a court could require by mandamus to be executed at the suit of any interested party. But it was pointed out in Leslie County v. Wooten, citing and approving Com'th. v. Boone County Court, 82 Ky. 632, 6 Ky. Law Rep. 755, that mandamus would not lie to compel the fiscal court to build a new bridge, notwithstanding the section of the statute, which pro-

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vides (section 4345 of the Kentucky Statutes of 1903) that it shall be the duty of the fiscal court to make immediate provision for an emergency, includes the building of new, as well as repairing of old, bridges. In Clay City v. Roberts, 124 Ky. 594, 99 S. W. 651, 30 Ky. Law Rep. 820, the same case was cited with approval. The court refused the mandamus to compel the municipality to construct a new bridge, drawing a distinction between the construction of a new and the reconstruction of an old one.

We now come to the Nelson County case. That case was an agreed action filed in the circuit court for the construction by that court of the sections of the statute concerning the obligation imposed by statute upon a town of the fifth class and the county in which it was situated respecting the keeping up of the public highways which traversed both of the units. A mandamus was not sought in that case. Neither municipality was refusing to do what it had to do. On the contrary, they were seeking light as to what their legal duty was in order that they might do it. The sole questions presented were, first, whose duty was it to keep up that part of the turnpike formerly owned by private corporations, but recently acquired under the free turnpike act, which now lay within the incorporated towns? The court answered that query upon the authority of Board of Council of Danville v. Fiscal Court of Boyle County, 106 Ky. 608 21 Ky. Law Rep. 196, 51 S. W. 157, to the effect: "That the turnpikes, when purchased by the fiscal court, became public highways; the part lying within the city, being a public way, should be controlled by it; and the part without the city, falling within the fiscal court's jurisdiction, should be controlled by it." The second question submitted by that case was as to which of

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the municipalities was under the duty to keep in repair a bridge across a stream which constituted the dividing line between the city and the county. Section 3643 of the Kentucky Statutes of 1903, governing cities of the fifth class, was cited as the chart of the court's deliverance on this subject, although the word "bridge" was not used in that section, dealing with streets, avenues, and highways. This court then held: "This statute is broad enough to include everything made necessary for the sufficiency of the public ways for purposes of travel, and, while the statute does not use words declaring the power of the city council exclusive, the necessary effect of the statute is the same as if such words had been used." The bridge was differentiated from a street. Elizabethtown v. Hardin County and Leslie County v. Wooten were cited as authority. It was pointed out in that case that the bridge was not required for purposes of urban travel, but only for the travel to and from the county; that, while nominally within the corporate limits, practically it was outside of such centers of population as required considerable use of it by the urban population. For that reason it was held to be a part of the county highways, and that the county fiscal court was under the duty to keep it in repair.

It should be noted at this point that the facts of the case at bar are materially different from those in any of the cases above discussed. Here the bridge was not built by the county, was never owned by it, and the fiscal court never assumed or exercised any control over it. Furthermore, this bridge is in the heart of the city, is used mainly by its own population for their convenience, and only incidentally by the people from the country. If the case had merely stopped at the point of saying upon the authorities of

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the cases above cited that the county was under the obligation to keep this bridge in repair, the result would not have been so objectionable. In that event, under the authorities indicated, a mandamus would lie at the suit of the citizens of the town or county, or at the suit of the town, against the fiscal court to require it to perform the duty held to be imposed upon it under the statute to keep the bridge in repair. But the case does not stop there. The town did not pursue the course adopted by the plaintiffs in any of the cases above cited. It did not resort to the courts to require the fiscal court of the county to act in discharge of its statutory duty, and to exercise in its discharge such discretion as was vested in it by law. But this city, usurping the jurisdiction and functions of the fiscal court, contracted a debt on behalf of the county. It exercised a discretion vested by statute in the fiscal court as to what kind of repairs should be made upon a county bridge, if this be a county bridge, and has in fact erected a handsome and expensive concrete bridge at a cost of more than $3,000, over an insignificant stream—an ornate affair that would speak well for the pride and public spirit of the city, were we not reminded by this suit that it expects the bill to be paid by the county at large.

The opinion is an anomaly, furthermore, in that it asserts obiter dictum that, notwithstanding this bridge is a part of the county highway, yet for failure to keep it in repair—a neglect of duty in part at least by the fiscal court, as the opinion holds, the city would be liable to one injured thereon. The converse perhaps would seem to be true—that if the county should voluntarily execute the duty of keeping the bridge in repair, but do so in such manner as that an employe or other person were in-

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jured thereby, the city would be liable in damages for the injury. In Town of Paintsville v. Commonwealth, 21 Ky. Law Rep. 1634, 55 S. W. 915, it was said: "When a public way is opened through a city for the use of the public, and is accepted and used by the city, such way, and any bridge forming part of it, becomes a public way of the city, and, if necessary and for the use of the citizens, such bridge must be kept in repair, and must not be suffered by the city to become and remain unsafe for travel. The town authorities have control over it. Section 3704, Ky. Stats. 1903. The citizens of the town are exempt from working upon the county roads outside the town limits. Section 4308. The city, for governmental purposes, is separate from the remainder of the county. Section 1851." And in Clay City v. Roberts, supra, it is said: "There is a special statute governing the replacing of county bridges which have been lost or destroyed, but this statute is not applicable to cities and towns, nor does it refer to or treat of bridges within the corporate limits of a town which have been destroyed." It was decided that mandamus would not lie against the town to require it to repair a bridge within its limits and forming a part of its system of highways.

We then have this state of case under the opinions of this court: That a bridge within a town which forms a part of a general highway traversing a county should be rebuilt, in case it falls into disrepair, in part by the town and in part by the county; that the chancellor will judge as to how much each municipality should contribute; that as to the county mandamus will lie to compel the fiscal court to perform its part of its duty, but that as to the town mandamus will not lie to require it to perform its

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part; and, furthermore, if the county fails to perform its duty, instead of resorting to mandamus, the city may act for the county and incur for the latter a very heavy expense. This confusion, which is further extended by the opinion in this case, is the result, in my judgment, of an attempt on the part of the court to relieve a situation which calls for some remedy, but which has not been provided for by legislation.

JUDGES NUNN and SETTLE, concur in this dissent.

CASE 16.—ACTION BY ANNIE THURMAN AGAINST THE WESTERN UNION TELEGRAPH CO. FOR DAMAGES FOR FAILURE TO DELIVER A TELEGRAM. —November 15.

Thurman v. Western Union Telg. Co.

Appeal from Jefferson Circuit Court; Common Pleas Branch; Second Division.

THOS. R. GORDON, Judge.

From a judgment sustaining a demurrer to the petition, the plaintiff appeals—Reversed.

1. Telegraphs—Failure to Deliver Message—Actions for Damages —Mental Suffering.—The right of recovery against telegraph companies for mental suffering has been extended to all cases in which mental suffering may be reasonably anticipated as the natural result of a breach of contract, and this is shown on the face of the telegram.
2. Same.—Where a wife in Louisville, in accordance with an agreement with her husband, telegraphed him in Chicago

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that their child was worse, that she had smallpox, and had been sent to the pesthouse, and the telegraph company failed to deliver the message, and on this account the husband did not go home to Louisville nor communicate with his wife for some time thereafter, leaving her without his advice and instructions regarding the care of the child, her mental distress resulting therefrom will support an action of damages against the company.

3. Same.—The following telegram, sent from Louisville: "To Harry Thurman, Great Northern Theater, Chicago, Ill.: Nellie worse; pronounced smallpox; sent to pesthouse to-day. Wife" —Nellie being the child of the sender and Harry Thurman, was sufficient to indicate to the telegraph company that the wife's object was to secure the assistance and consolation of her husband, and the company, failing to deliver the message, and thereby preventing his return to Louisville, must answer in damages for her mental anguish caused by depriving her of her husband's presence, advice, and superior judgment.

Judge Barker dissenting.

O'NEAL & O'NEAL and ISAAC T. WOODSON for appellant.

RICHARDS & RONALD and GEORGE H. FEARONS for appellee.

(No briefs in the record.)

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

This is an appeal from a judgment of the Jefferson circuit court, common pleas branch, second division, sustaining a demurrer to and dismissing appellant's petition. The object of the action was to recover of appellee damages alleged to have been sustained by appellant on account of its failure to deliver within a reasonable time the following telegram: "Received at the Board of Trade office, Louisville, Kentucky, March 2nd, 1906. To Harry Thurman, Great Northern Theater, Chicago, Ill. Nellie worse; pronounced small-pox; sent to pest-

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house to-day. Wife." Harry Thurman to whom the telegram was addressed, is appellant's husband, and the Nellie mentioned therein their daughter. The following facts appear from the averments of the petition: That the husband, Harry Thurman, left Louisville, Ky., for Chicago, Ill., shortly before March 2, 1906, and that at the time he left Nellie, the daughter, was slightly ill, but the nature of her illness was not then known to the parents. It was, however, agreed by them at the time of the departure of Harry Thurman for Chicago that Mrs. Thurman would telegraph him there, care of Great Northern Theater, if their daughter grew worse, in order that he might immediately return to Louisville. On March 2, 1906, the discovery was made that the child had smallpox, and on the same day she was removed to the pesthouse. When this was done, Mrs. Thurman, acting upon the agreement between herself and husband, sent him the telegram set out above, and at the time of doing so paid appellee's agent the price customarily charged for such a message. That Harry Thurman was in Chicago on the day the message was sent, and when it should have reached that city, if it had been sent in a reasonable time, and that he would have received the message if any effort had been made by appellee to deliver it in the usual and a reasonable time, and thereby been enabled to start at once for Louisville, and arrive there on the morning of March 3, 1906, but this he was prevented from doing by the negligence of appellee in failing to forward or deliver to him the message within a reasonable time. That he was, in fact, permitted to leave Chicago without receiving the message, and did not know it had been sent, or learn of the illness of his child until his

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arrival in Louisville, several days later. It further appears from the record that the child recovered.

The effect upon appellant of appellee's failure to promptly forward and deliver the message is expressed in the petition as follows: "That she was in great mental anguish and distress on account of the condition of her said child, and was in great need of the advice and counsel of her said husband in said distress, * * * and by reason of said negligence this plaintiff was deprived of the advice and counsel of her said husband in her said distress and anxiety, all of whch was caused by the gross negligence and carelessness of the defendant in failing to deliver said telegram. She says that, because of the negligence aforesaid of the defendant, its servants, and employes, the husband of the plaintiff did not return to the city of Louisville on said 3d day of March, 1906, or for many days thereafter, and did not communicate in any manner with plaintiff, or notify her of his receipt of said telegram, or of his whereabouts, or give her any advice, counsel, or instruction as to said child, or his wishes in said matter, and she was caused great mental anguish because thereof, and all of which was directly caused by the gross negligence and carelessness of defendant, its servants, and agents aforesaid." We infer from the briefs of counsel that the demurrer was sustained in the court below on the ground (1) that there can be no recovery for mental anguish such as appellant claims to have suffered in this case; (2) that the language of the telegram was not such as to apprise appellee that the wife's object in sending it was to secure the presence and consolation of her husband, and therefore it could not have been contemplated by the parties that damages would be claimed as a natural consequence of a

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failure to deliver the message. The decisions of this court in respect to actions against telegraph companies for mental suffering have not confined the right of recovery to such cases only as involve a failure to deliver telegrams announcing to near relatives the sickness or death of a member of the family; on the contrary it has, as said in Postal Telegraph and Cable Co. v. Terrell, 124 Ky. 822, 100 S. W. 292, 30 Ky. Law Rep. 1023, extended the right of recovery to "all cases in which mental suffering may be reasonably anticipated as the natural result of the breach of the contract, and this is shown on the face of the telegram." This doctrine was first announced by this court in Chapman v. Western Union Telegraph Co., 90 Ky. 271, 12 Ky. Law Rep. 265, 13 S. W. 880, later approved in Western Union Telegraph Co. v. Cleaver, 13 Ky. Law Rep. 301, and more recently reaffirmed in L. & N. R. R. Co. v. Hull, 113 Ky. 561, 24 Ky. Law Rep. 375, 68 S. W. 433, 57 L. R. A. 771, and Postal Telegraph & Cable Co. v. Terrell, supra We also find authority to support the doctrine in the decisions of some of the courts of last resort in other states, such as Green v. Telegraph Co., 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955; W. U. Tel. Co. v. Taylor (Tex. Civ. App.) 81 S. W. 69; W. U. Tel. Co. v. Burgess (Tex. Civ. App.) 56 S. W. 237. Numerous text-writers also recognize the same doctrine, and give it their approval. Shearman and Redfield on Negligence, sections 605-756; Thompson on Negligence, sections 2471, 2476, 2477, 2480.

The second question we are asked to consider is not difficult of solution. Manifestly the language of the telegram was sufficient to indicate to appellee that appellant's object in sending it was to secure the

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assistance, advice, and consolation of her husband, which presumably could not be received without his return. The fact that she signed the message "Wife" proved the relationship she sustained to the person to whom it was addressed. The familiarity exhibited by the use of the name "Nellie" also indicated either that the person referred to was a child of the "Wife" and her husband, Harry Thurman, or that she sustained to them a close family relationship, and the further facts that "Nellie" had the smallpox and had been sent to the pesthouse demonstrated the dire distress of the sender of the message, and her urgent need of some sort of assistance from, if not the preence of, the absent husband. If, as alleged in the petition, appellee's negligence in failing to send or deliver the telegram in question prevented the return of appellant's husband to Louisville, and deprived her of his superior judgment, advice, and capacity to afford consolation in the emergency that thus suddenly confronted her, thereby causing her great mental suffering as they were well calculated to do, we fail to see any good reason for holding that she cannot recover damages therefor. In other words, as further aptly said in Postal Telegraph & Cable Co. v. Terrell, supra: "In the case at bar the telegram apprised the defendant that mental suffering might reasonably be anticipated from the failure to deliver the telegram, and to allow mental, suffering to be recovered for is only to show such damages as the parties should reasonably have anticipated to result from the breach of the contract. Telegraph companies are common carriers. They may take private property under the power of eminent domain. They are required to serve the public. When they negligently fail of their duty, they

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should be held to a just responsibility, and there is no reason why they should not answer for such damages as may reasonably be anticipated to result from the breach of the contract. Were the rule otherwise, no adequate recovery could be had for the non-delivery of many very important telegrams, such as one announcing the straying or finding of a child, or other social matters. * * *"

Being of opinion that the petition states a good cause of action, and that the lower court erred in sustaining the demurrer, the judgment is reversed, and cause remanded, with directions to overrule the demurrer and for further proceedings consistent with the opinion.

JUDGE BARKER, dissenting.

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CASE 17.—ACTION BY CLARK A. WINCHESTER'S EXECUTRIX AGAINST THE SOUTHERN RAILWAY IN KENTUCKY FOR THE NEGLIGENT DEATH OF PLAINTIFF'S INTESTATE.—November 15.

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Southern Ry. Co. in Ky. v. Winchester's Ex'x.

Appeal from Jefferson Circuit Court; Common Pleas Branch; First Division.

EMMETT FIELD, Judge.

Judgment for plaintiff, defendant appeals—Reversed.

1. Railroads—Accident at Street Crossing—Sufficiency of Warning—Question for Jury.—In an action against a railway company for the death of a pedestrian at a street crossing, held, under the evidence, a question for the jury whether adequate notice of the approach of the train was given.
2. Same—Evidence—Admissibility.—In an action against a railway company for the death of a pedestrian at a street crossing, alleged to have resulted from a negligent failure to give warning of the approach of a train, it may not be shown that warning was not given on previous occasions.
3. Same—Duty at Crossings.—A railway company is liable for injuries resulting from its failure to have its train under reasonable control in approaching a street crossing, to keep reasonable lookout for persons using the crossing, to give timely notice of the train's approach by ringing the engine's bell, to have the headlight burning, or to exercise ordinary care to prevent injury to persons using the crossing.
4. Same.—Where a street crossing over railroad tracks is used by many persons, and is more than ordinarily dangerous to such persons, the company, in addition to the usual signals, must provide such signals as are reasonably necessary to give notice of a train's approach to the crossing.
5. Same—Instructions—Care Required of Pedestrian.—In an action against a railway company for the death of a pedes-

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trian at a street crossing, an instruction that if, in approaching the crossing, he failed to exercise ordinary care for his own safety, and such failure contributed to his injury, and he would not have been injured except for his own negligence, plaintiff could not recover, was erroneous for not defining the pedestrian's duty.

6. Same—Pedestrian's Duty.—It is the duty of a pedestrian in approaching a railroad crossing to use such care as may be usually expected of an ordinarily prudent person to learn of the approach of trains and keep out of their way, and, if the crossing is especially dangerous, he must exercise increased care commensurate with the danger; and if his failure to do so causes him injury he can not recover, though the company is negligent in not keeping its train under reasonable control in approaching the crossing, in not keeping a reasonable lookout and in giving inadequate warning.

Judge Nunn dissenting.

HUMPHREY & HUMPHREY and L. R. YEAMAN, attorney for appellant.

POINTS AND AUTHORITIES.

1. Even if there was a scintilla of evidence requiring a submission of the case to the jury, the lower court should have set aside the verdict because flagrantly against the weight of the evidence. (Hurt v. L. & N. R. R. Co., 116 Ky., 550.)

2. Evidence that the crossing bell did not ring on occasions prior to the accident was inadmissible.

(a) There was no allegation that this bell or any of appellant's appliances were defective, and in the absence of such an allegation this evidence was not admissible to show appellant's knowledge of the defective condition of its appliances. (Ency. of Pl. & Prac., vol. 4, p. 742; Cincinnati, etc., Ry. Co. v. Barker, 14 Ky. Law Rep., 143; McCain v. L. & N. R. R. Co., 13 Ky. Law Rep., 334; L. & N. R. R. Co. v. McGary's Admr., 104 Ky., 511; L. & N. R. R. Co. v. Clark's Admr., 105 Ky., 571, 582; Sandy River Cannel Coal Co. v. Caudill, 22 Ky. Law Rep., 1177; South Covington & Cincinnati Ry. Co. v. Stroh, 23 Ky. Law Rep., 1807; Chun v. K. & I. B. Co., 23 Ky. Law Rep., 1092; Thomas v. L. & N. R. R. Co., 18 Ky. Law Rep., 164; C. & A. R. R. Co. v. C. G. Pearson, 71 Ill. App., 622.)

(b) It is not permissible to prove negligence on a particular occasion by evidence of negligence on prior occasions. (L. &

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N. R. R. Co. v. Berry, 88 Ky., 222, 225; Eskridge's Exrs. v. C., N. O. & T. P. Ry. Co., 89 Ky., 367, 371, 372; L. & N. R. R. Co. v. Webb., 99 Ky., 332, 346; Hutcherson v. L. & N. R. R. Co., 21 Ky. Law Rep., 733, 735; C. & O. Ry. Co. v. Riddle's Admx., 72 S. W., 22, 23; I. C. R. R. Co. v. Watson's Admr., 117 Ky., 374; I. C. R. R. Co. v. Borders, 61 Ill. App., 55; L. & N. R. R. Co. v. Wallace's Admr., 6 Ky. Law Rep., 302.)

3. The verdict was excessive. (Ky. Stats., section 6; C. & O. Ry. Co. v. Lang's Admr., 19 Ky. Law Rep., 67; L. & N. R. R. Co. v. Kelly's Admr., 19 Ky. Law Rep., 74.)

CHAS. H. SHIELD and O'NEAL & O'NEAL for appellee.

The mere statement of the undisputed facts in this case is a demonstration that the appellant was guilty of the grossest negligence in that at a dangerous crossing, made dangerous by the curve in their tracks, by the fact that no employee of the crew operating the train could obtain a view of the crossing, by reason of the fact that no lookout was maintained by the company, and in the admitted fact that they had no gate at this crossing, they had no watchman there, and had provided and maintained no adequate signal to protect the public who had a right to use the street, from injury and death occasioned by the operation of the road in such a manner; if we had nothing else in this case except the statements of the defendant's witnesses, under the decisions of this honorable court the railroad company appellant has not maintained a proper system of signals to protect the public, and that fact in itself constitutes negligence sufficient to justify recovery.

AUTHORITIES CITED.

L. & N. R. R. Co. v. Crowley, 21 Ky. Law Rep., 1434; L., N. A. & C. R. R. Co. v. Sheck, 14 Ky., 833; Ky. Cent. R. R. Co. v. Smith, 93 Ky., 449; L. & N. R. R. Co. v. Morris, 14 Ky. Law Rep., 466; L., C. & L. R. R. Co. v. Goetz, 79 Ky. 442, 25 L. R. A. 287; Paducah & M. R. R. Co. v. Hoehl, 75 Ky., 41; C. & O. Ry. Co. v. Dixon, 104 Ky., 608; Cahill v. Cin. South. Ry. Co. 13 Ky. Law Rep., 714; Seetz v. L. & N. R. R. Co., 25 Ky. Law Rep., 1548; L. & N. R. R. v. Millett, 20 Ky. Law Rep., 532; Southern Ry. Co. v. Evans, 23 ky. Law Rep., 568; Alexander v. Bradley, 66 Ky., 667.

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OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

On November 29, 1905, about 5:40 a. m., Clark A. Winchester was struck by an out-going train of the Southern Railway Company in Kentucky on the Hemlock Street crossing in Louisville, Ky., and instantly killed. This action was brought by his executrix to recover for his death, and, judgment having been entered in favor of the plaintiff against the railway company, it appeals.

It is charged in the petition that the Hemlock Street crossing was unusually dangerous; that it was much used; that the train that struck Winchester was running at a too rapid rate of speed; that there was no warning or notice of its approach to the crossing; that those in charge of the train did not have it under proper control and were not keeping a lookout; that there was no flagman, watchman, or gate at the crossing, as there should have been, as the crossing was in a thickly settled part of the city and was much used. By its answer the defendant controverted the allegations of the petition and pleaded affirmatively that the decedent lost his life by reason of his contributory negligence. This was controverted by the reply, which made up the issue.

The proof on the trial showed that the railroad crossing at Hemlock street was on a sharp curve, and that the right of way at this point was very narrow. One witness says it was only about 20 feet wide. Winchester was approaching the crossing from the south, and as he came along the sidewalk a high fence shut off all the view until he got within a few feet of the track. When he came from behind

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the fence and got upon the right of way, by reason of the sharpness of the curve he could not be seen by either of the men on the engine. The engineer testified that his view was cut off by the boiler, and the front brakeman, who was watching on the other side of the cab, did not see Winchester until after he was struck by the train, in consequence of the curve. One witness who was getting a bucket of water on the corner lot, only a few feet from the crossing, testified that as the train passed her no bell was ringing, and the plaintiff introduced other witnesses tending to confirm the testimony of this witness. By an ordinance of the city of Louisville the whistle is not allowed to be blown in the city limits, except in cases of emergency.

The proof for the defendant showed that it had on the engine a bell which rang automatically; that this bell was started when they left the yards, and was ringing when they approached the crossing. The train was a heavily laden freight running eight or ten miles an hour upgrade, and the exhaust made considerable noise. There was no gate or watchman at the crossing. There was a gate at the Catalpa street crossing, one square away, and also a gate at the Woodland avenue crossing one square away in the opposite direction. At the Hemlock street crossing there was a bell at the top of a pole. The bell was about the size of an engine bell, and had an arm to it from which a wire ran to the Catalpa street crossing and another to the Woodland avenue crossing. When a train was approaching the watchman in the tower at Catalpa street would ring the bell by pulling the wire if the train was coming from that direction; and if it was coming from the other direction the watchman at Woodland avenue pulled the

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wire and rang the bell. The defendant showed by these watchmen that the bell was ringing at the time the train in question approached. The defendant also proved by a witness who was coming along Hemlock street, approaching the crossing, some distance behind Winchester, that he heard the train coming and also heard a bell ringing.

It is insisted for the defendant that on this proof the court should have instructed the jury peremptorily to find for the defendant, and that under all the evidence no judgment against it should be permitted to stand. We cannot concur in this view. If the plaintiff's proof was true, neither of the bells was ringing; and, while the weight of the evidence would perhaps show that the engine bell was ringing, it would by no means follow from this that adequate notice of the approach of the train was given. It is well known that light and sound travel in straight lines. From the sharpness of the curve, the light from the headlight of the engine would not be thrown upon the crossing until the engine was practically at it; and the headlight would therefore not give the traveler who was near the crossing warning of the approach of the train. As sound also travels in a straight line, this might reach a man who was back from the crossing some distance where it would not reach a person who was near the crossing, as Winchester was, and he would have no notice of the approach of the train, unless he might see it, and this he could not do until he was practically on the track. Under the evidence of the defendant this train was running over the crossing without any lookout; for neither of the men in the cab who were looking out saw Winchester, or could see a man after he would come in view at the crossing. This was in a thickly

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settled part of the city. There was much traveling over the crossing, and, in view of the proof, it was a question for the jury, whether adequate notice of the approach of the train was given. Persons approaching the crossing would naturally look to the bell on the pole, and, if this bell was not ringing, presume that the crossing was safe; for the bell was put there to notify the public of the approach of the train, and, if it was not rung when this train approached, it was misleading. In thickly settled communities the railroad company must give adequate notice of the approach of its trains, and must keep a reasonable lookout; and where, as here, the ordinary means of giving notice and the ordinary lookout would be insufficient, other precautions must be provided.

The plaintiff introduced W. A. Thomas, and he was allowed to state as follows, over the defendant's objection: "Q. Prior to the accident I will ask you if it would always ring when the wires were pulled. By the Court: Do you remember this occasion? A. I was not present at the time this happened. Q. State how the bell would act there before the accident. A. I have frequently noticed that bell to shake, and not to ring." It also introduced Earnest Guthrie, and he was allowed to state as follows, over the defendant's objections: "Q. I will ask you to state if you had noticed that bell before Mr. Winchester was killed, when trains were approaching and when the tower man was trying to operate it, whether it would ring. (Objected to by counsel. Objection overruled, to which defendant by counsel excepted.) Q. Tell the jury what you have noticed about that. A. Sometimes it would ring and sometimes it would not. Sometimes you would see the post vibrate, and the

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bell would attempt to ring, but could not do it on account of various causes. Sometimes the wind would twist the wires, and that would cause them to work with friction, and the friction was so great that the bell would not ring, and other times the wire would be broken and the wire would not work. The tapper would be held on one side, and the pole would shake, but there would be no sound. Q. Before the accident did that occur often or seldom? A. It occurred frequently?" Matthew L. Blair and George W. Grant, who were also introduced by the plaintiff, were allowed to give similar testimony over the defendant's objection. The objection to this testimony should have been sustained. The question was whether adequate notice of the approach of the train in question was given. If proper notice of the approach of the train was given, it was immaterial that proper notice was not given of the approach of some previous train. The fact that the bell would sometimes ring on previous occasions, and sometimes would not ring, when the watchman pulled the wire, is no evidence that it did not ring at the time in question. If the watchman on other occasions was negligent, this fact cannot be proved to show that he was negligent on this occasion. The question the jury are to try is simply whether proper notice of the approach of this train was given; and, if the bell was in fact ringing as this train approached, the defendant discharged its duty in that regard. The proof that the bell frequently did not ring did not tend to show that it did not ring on this occasion; for it is evident from the proof that the bell frequently did ring, and so the evidence, as far as the ringing of the bell goes, would tend as much to show that the bell was ringing at the time in question as that it was not ringing. The

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only effect of the evidence was to get into the case proof that on other occasions the defendant had been guilty of negligence in not giving proper notice of the approach of its trains. It is well settled that this cannot be done.

The court at the conclusion of the testimony gave the jury these instructions: "(1) The court instructs the jury that it was the duty of the defendant's employes in charge of the train which struck Clark A. Winchester at the time and place mentioned in the petition to have the engine under reasonable control when it approached the crossing at Hemlock street, to keep a lookout ahead for the persons who were using the crossing, to give timely notice of the approach of the train by ringing the bell of the engine, to have the headlight burning, and to exercise ordinary care to prevent injury to persons using the crossing; and if the jury shall believe from the evidence that the said employes failed to perform any of these duties, and that by reason thereof the said Clark Winchester was struck by the engine and killed, then the law is for the plaintiff, and they should so find, unless they shall further believe from the evidence that the said Winchester was negligent, and thereby helped to cause or bring about his injuries, and that he would not have been injured but for his contributory negligence, if any there was. (2) The court instructs the jury that if they shall believe from the evidence that the crossing at Hemlock street was used by many persons, and that it was more than ordinarily dangerous to persons using it, then it was the duty of the defendant, running its trains over the said crossing, in addition to the usual and ordinary signals, to provide such signals as were reasonably necessary to give notice of the train's approach

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to the crossing; and if it failed to provide such signals as were reasonably necessary at that crossing, and by reason of such failure the said Winchester received the injuries complained of, and he did not help to cause or bring about his injuries by negligence on his part, but for which he would not have been injured, then the law is for the plaintiff, and they should so find. (3) It was the duty of the said Winchester, when he approached the said crossing, to exercise ordinary care for his own safety; and if he failed to exercise that degree of care for his own protection, and by reason of such failure he helped to cause or bring about his injuries, and he would not have been injured but for his contributory negligence in that respect, if any there was, then the law is for the defendant, and so the jury should find, even though they may believe from the evidence that the defendant or its employes failed to discharge the duties incumbent upon them."

We see no objection to instructions 1 and 2; but the third instruction is defective, in that it does not define the duties of the decedent in using the crossing. In L. & N. R. R. v. Cummins' Administrator, 111 Ky. 338, 23 Ky. Law Rep. 681, 63 S. W. 595, we thus laid down the rule: "In using the railroad and the street crossing, both parties were required to exercise the same degree of care. It was incumbent on appellant to give such notice of the approach of the train to the crossing, to run the train at such speed, keep such lookout, and use such care to avoid injury to persons thereon as might usually be expected of ordinarily prudent persons operating a railroad under like circumstances. It was incumbent on the intestate to use such care as might usually be expected of an ordinarily prudent person, situated

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as he was, to learn of the approach of the train and keep out of its way. If the crossing was especially dangerous, it was incumbent on both parties to exercise increased care commensurate with the danger. In lieu of the third instruction on another trial, the court will tell the jury that it was the duty of the intestate, on approaching the crossing, to use such care as may be usually expected of an ordinarily prudent person to learn of the approach of the train and keep out of its way; that, if the crossing was especially dangerous, it was incumbent on him to exercise increased care commensurate with the danger; and that if he failed to exercise such care, and but for this would not have been injured, then the law is for the defendant, and the jury should so find, even though they may believe from the evidence that the defendant or its employes were negligent as set out in No. 1 and No. 2.

The other matters complained of will perhaps not occur on another trial.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

Judge Nunn dissents on the question of the incompetency of the evidence referred to.

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CASE 18.—APPLICATION TO A JUDGE OF THE COURT OF APPEALS TO REINSTATE A RESTRAINING ORDER OBTAINED FROM A CLERK OF THE LEE CIRCUIT COURT IN AN ACTION OF ONE KELLY AND OTHERS AGAINST THE PULASKI STAVE CO. AND OTHERS AND BY THE JUDGE OF THE SAID CIRCUIT COURT SUBSEQUENTLY DISSOLVED.—November 15.

Kelly v. Pulaski Stave Co.

Motion to reinstate restraining order overruled. Motion heard in chambers.

1. Courts—Appellate Courts—Jurisdiction to Reinstate Restraining Order.—Civil Code Prac., section 297, provides that, where an injunction is dissolved or modified by the court before final judgment or by a circuit judge, plaintiff may apply to a judge of the court of appeals to reinstate it. Section 296, subsection 2, provides that, where an injunction has been granted or continued by interlocutory order, the party enjoined may apply to a judge of the court of appeals for the dissolution or modification of the injunction. Section 276 provides that, where the court or officer to whom application for an injunction is made shall be satisfied an irreparable injury will result to applicant from the delay of giving notice, the court or officer may enter a temporary order restraining the acts sought to be enjoined. Held, That a judge of the court of appeals was without jurisdiction of an application to reinstate a restraining order granted under section 276 and dissolved by the judge of the lower court; such restraining order not being an injunction within section 297 or section 296, subsection 2.
2. Injunction—Right to—Statutory Provisions.—An injunction or temporary restraining order may be granted in an action at law; the Code provisions on the subject not abolishing the common-law jurisdiction attaching to courts of equity to grant injunctions, but merely regulating the practice.

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GRANT E. LILY for plaintiffs.

GOURLEY, REDWINE & GOURLEY for defendants.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—In chambers.

The plaintiff in an action at law in the nature of an action of trespass obtained a restraining order from the clerk of the Lee circuit court against the defendant's cutting and removing timber from a certain boundary of land, claimed in the petition to belong to the plaintiff. The temporary restraining order was granted by the clerk without notice to the defendants because of the immediate urgency set forth in the plaintiffs' complaint. The order was granted under section 276 of the Civil Code of Practice. The defendants gave notice of an application to his honor Watts Parker, the judge of the Fayette circuit court, to dissolve the restraining order. Upon hearing the judge did dissolve it. The application is to a Judge of the Court of Appeals to reinstate it.

The question for decision is, has a Judge of the Court of Appeals jurisdiction in the matter? It was held in Matthews v. Rogers, 107 Ky. 236, 21 Ky. Law Rep. 905, 53 S. W. 413, and in Jones v. Walter, 70 S. W. 191, 24 Ky. Law Rep. 878, that he has not. These opinions were intended for the guidance of all the judicial officers of this Commonwealth, as well as of lawyers and litigants in the practice of injunction proceedings. I do not feel at liberty to depart from the rule there indicated, even if I did not concur in the correctness of the court's interpretation of the statutes. A frequent recurrence of motions to reinstate restraining orders indicates that many of the bar have failed to note the distinction drawn by the

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court in those cases between restraining orders and injunctions. It will be noted that restraining orders are issued only when, owing to some threatened immediate injury that would be irreparable, it would be impracticable to give notice of an application for an injunction. Such restraining orders may be issued either by the court, or any circuit judge, the clerk of the court, or the county judge, if the judge of the court be absent from the county, or by two justices of the peace if the judge and the clerk of the court and county judge be absent from the county. It is denominated a "temporary restraining order." It is intended to maintain the status quo until the parties may by due notice bring the question whether an injunction should be granted before an officer authorized to grant it. An injunction is granted only after notice. It may be no broader than the restraining order. But it differs from the former in the particular of the manner of its obtention. It may be granted by the court or any of the officers above named. Failure to give notice renders the order of injunction void. Weaver v. Toney, 107 Ky. 419, 21 Ky. Law Rep. 1157, 54 S. W. 732, 50 L. R. A. 105. An injunction granted by any other officer than a circuit judge or the court may be dissolved upon notice by the court in which the action is pending, or by any circuit judge. Section 290, Civ. Code Prac.

When an injunction is dissolved or modified by the court before final judgment, or by a circuit judge, the plaintiff may apply to a Judge of the Court of Appeals to reinstate it (section 297, Civ. Code Prac.); or, where an injunction has been granted or continued by interlocutory order, the party enjoined may apply to a Judge of the Court of Appeals for the dissolution or modification of the injunction (subsection 2, sec-

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tion 296, Civ. Code Prac.). The jurisdiction of a Judge of the Court of Appeals is purely statutory. The beginning and the limit of it is within the sections of the statutes quoted. A Judge of the Court of Appeals has not the power to grant an injunction in any case. As to the temporary restraining orders mentioned in section 276 of the Civil Code of Practice, they may be set aside or modified by the court, or by any circuit judge, but not by an other tribunal or official. Nor is there power or jurisdiction vested anywhere under our statutes for an appeal from the judgment of the court or of the circut judge from an interlocutory judgment modifying or dissolving a temporary restraining order. If a Judge of the Court of Appeals could review the action of a circuit judge in setting aside a restraining order, or by requiring him to continue it, the effect would be that the appellate judge would grant an injunction which had never been granted.

The point is made in this case that an injunction cannot be granted in an action at law. I think this an erroneous assumption. The order of injunction and the kindred temporary restraining order, as practiced in this State, are statutory remedies, and, except where granted as a final judgment in an action, are ancillary to the principal action. The Code provisions on the subject do not abolish the common-law jurisdiction attaching to courts of equity to grant injunctions in such matters as those courts have granted from ancient times. But the Code regulates the practice in such cases. It also goes further, and allows the order of injunction to issue in any case where the facts justify the application of the ancillary remedy of injunction within the terms of the law as written in the Code.

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The motion to reinstate the restraining order in this case, for the reasons above given, is overruled. All the Judges concur.

CASE 19.—ACTION BY RACHEL THOMAS AGAINST THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. CO. AND OTHERS FOR DAMAGES FOR PERSONAL INJURIES.—November 20.

Tomas v. Cincinnati, N. O. & T. P. Ry. Co., &c.

Appeal from Pulaski Circuit Court.

M. L. JARVIS, Circuit Judge.

Judgment for defendant, plaintiff appeals—Affirmed.

Railroads—Injury to Trespasser—Liability of Company.—A railroad company is not liable for injury to a trespasser on the right of way and distant from a crossing, whose presence was not known, from the falling from the tender of a passing train of a gate usually used to keep the coal back, but which had temporarily been laid on top of the coal; this being at most negligence, and not recklessness or wanton disregard of life.

CAMPBELL & WILLIAMS, attorneys for appellant.

1. The court in handing down his opinion sustaining the motion of the defendants for a peremptory instruction, stated that in his opinion the only duty that the defendant owed the plaintiff was to exercise ordinary care, and that in his opinion under the proof the defendants exercised ordinary care toward the plaintiff as required by law.

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We contend the court erred in giving the peremptory instruction, for if the defendants owed the plaintiff any duty at all, it was for the jury to say whether such care was exercised and not for the court. The principle is so elementary we deem it unnecessary to cite any authority to sustain it.

2. The doctrine of appellant's contributory negligence can not be interposed in this case, because in this State it is an affirmative plea and must be proven as alleged and must appear to be the proximate cause of the injury. (Thompson on Negligence, vol. 1, sections 46 and 221; Newport, L. & A. Turnpike Co. v. Pirman, 82 S. W., 976; Biglow on Torts (students' series), pp. 339, 340, 341.)

O. H. WADDLE & Son for appellee.

There is no dispute as to the fact that appellant at the time the injury was received was using the railroad right of way, and was therefore a trespasser.

In all actions there must be some right invested in the plaintiff and some corresponding duty owing to the plaintiff and the breach of this duty. This violation of the plaintiff's right and a breach of the duty owing to him by the defendants is what makes the wrong which gives the plaintiff a cause of action, and we submit that it is elementary that these elements must exist before there is any cause of action existing.

AUTHORITIES CITED.

1. Negligence—Failure of Proof—Peremptory Instruction. (Beiser v. Chesapeake & Ohio R. Co., 29 Ky. Law Rep., 249; Johnson v. Louisville & Nashville R. R. Co., 29 Ky. Law Rep., 36; Willis v. Maysville & B. S. R. Co., 29 Ky. Law Rep., 178; L. & N. R. Co. v. Eaden, 29 Ky. Law Rep., 365; L. & N. R. Co. v. Wade, 18 Ky. Law Rep., 549; Conley's Admr. v. C., N. O. & T. P. R. Co., 89 Ky., 402; DeWitt's Admr. v. L. & N. R. Co., 29 Ky. Law Rep., 1161; Brown's Admr. v. L. & N. R. Co., 17 Ky. Law Rep., 145; Chesapeake & O. R. Co. v. Nipp's Admr., 30 Ky. Law Rep., 1131.)

2. New Trial—Motion for—Time of Filing. (Loving v. Warren County, 14 Bush, 316; Ky. Code of Practice, section 342; Kistler v. Slaughter, Jr., 20 Ky. Law Rep., 1937.)

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OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

Appellant was walking beside appellee's railroad track and on its right of way through the country. She was not on or using any crossing. A passing freight train, going at a high rate of speed, came around a curve in the track at that point, when a coal gate, a wooden structure of slats used in the tender of the locomotive to keep the coal back, and which had been laid on top of the coal temporarily by the fireman, toppled off and struck appellant, inflicting painful injuries, for which she has sued. Her presence on the track was unknown to appellee or those in charge of the train. At the close of her evidence the court peremptorily directed a verdict and judgment for appellee.

Appellant relies on Conley's Adm'r v. C., N. O. & T. P. Ry. Co., 89 Ky. 402, 12 S. W. 764, 11 Ky. Law Rep. 602. In that case a cut of freight cars was turned loose down the track on a dark night, without light or person in charge to give warning of its approach, when it ran over Conley, in the town of Burgin. Conley was held to be technically a trespasser, but was at a point in a town where people might reasonably be expected to be found upon the railroad track at any time. The court held that the act was so reckless and wanton, and in such utter disregard of human life as to smack of savagery. It was likened to one's turning loose a dangerous and vicious animal on his own premises, where technical trespassers were known to be or reasonably expected. The company was held liable. Are the cases parallel? The Conley case might be likened to the old spring

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gun cases. No one has the right to kill people merely because they are trespassers. To turn loose a rapidly moving train of cars at nighttime, without light, warning, or control, and under conditions where it is reasonably certian they will run down persons on the track, trespassers and all others, would be highly anti-social and utterly devoid of thought for human life. In the case at bar the act was not necessarily dangerous. It may have been careless, in a sense, such that, had the injury been inflicted upon a person to whom the company owed an active duty, it would have been responsible for. But the gate was not likely to fall off the tender in the usual course of things. As placed it was in no sense reckless, or a wanton disregard of human life. It was about as innocent as any careless act could be. Unless, therefore, the same liability is to be imposed upon railroads with regard to trespassers, and employes and passengers, putting all on substantially the same footing as respects the company's duty toward them, the actual difference in their relation must form the distinction in the company's duty toward them.

This actual difference is, passengers are received at known times and expected places. They can be provided for, and must be. Employes have designated places to work, and are furnished implements of the company's selection with which to do their work. They perform their duties at times, in places, with appliances, and under rules all governed by the company. Their safety can be reasonably provided for. But trespassers come and go at all times, at all places, ungoverned by rules, and unmindful of duties. The company, not knowing when and where to look for them, is unable to guard against every kind of injury to them. Many kinds of danger to them, the

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most usual, and at the most usual places of resort by them, must be looked out for, and the trespassers protected from injury, if then possible, as we have repeatedly held. If they are seen in time to avert their injury, they must not be hurt, is the universal rule. Manifestly the least duty is owing to them by the railroad company, not because their lives are regarded as of less value, nor because they forfeit either life or limb by their heedless act. The distinctions are based upon just grounds—are consonant with the best judicial thought and the soundest public policy. If, on the other hand, the railroad company were required at its peril to keep a constant lookout for trespassers on its right of way along its whole route at all seasons and hours, and in addition equip and manage its trains and build its track and trestles with the idea of responsibility to them, no longer would there be any distinction between the duty owed those rightfully and those wrongfully using the railroads tracks and property. A too tender regard for the latter would be apt to work more injustice than otherwise. It would, too, encourage a species of lawlessness and recklessness in a class already too prone to take all kind of chances. Negligence is the antithesis of duty. Where there is no duty, there cannot be negligence. As appellee was not under the duty to anticipate appellant's presence at the point where she was then hurt, and as it did not in fact know of her presence, it was not required to make its trains safe as to her. The fact that they were unsafe, but not recklessly or wantonly so, was not, therefore, a breach of duty to her, and is not actionable negligence.

The judgment is affirmed.

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CASE 20.—PETITION BY S. PARRISH AGAINST W. F. POWERS TO CONTEST AN ELECTION FOR COUNTY SURVEYOR.—November 21.

Parrish v. Powers

Appeal from Madison Circuit Court.

J. M. BENTON, Circuit Judge.

From a judgment sustaining a demurrer to his petition the plaintiff appeals—Reversed.

1. Elections—Nominations—Presumptions.—Where a county clerk places a candidate's name upon a ballot without dispute or contest, it will be presumed that the candidate was regularly nominated and that his nomination was certified to the clerk as provided by statute.
2. Same—Eligibility.—The allegation, in a petition to contest an election, that the contestant was the Republican candidate, is sufficient, without an express averment of his eligibility.
3. Same—Ballots—Pasters—Where a private person, after election ballots are printed, places his name under the Democratic device by means of pasters, as though nominated by that party, having no right to so place his name, his election is void.
4. Same—Effect on Void Election.—Where a private person wrongfully places his name on ballots, under the Democratic device by means of pasters, rendering his election void, the candidate receiving the next highest number of votes will be deemed elected, since the ballot will be treated as it was before the name was placed on it, and as it would have been if his name had not so appeared on it.

GRANT E. LILY and STEPHEN D. PARRISH for appellant.

POINTS AND AUTHORITIES.

In democratic social organization, political agency (official)

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rights can be granted, or secured only by compliance with regularly recognized and potent legal prescriptions, the basis thereof, and vitality of the public official authority therein inherent.

AUTHORITIES.

Ky. Stats., section 41; Acts Ky. Legislature, 1904, p. 263; 26 Ky. Law Rep., 1011; 93 Ky., 223; 24 Ky. Law Rep., 545, 1046; Civil Code, section 732; Ky. Stats., sections 1471 and 460; Constitution, sections 6 and 147; 19 Ky. Law Rep., 1134; 104 Ky., 483 (mandatory, etc.); Cooley's Const. Limitations, 441.

J. A. SULLIVAN for appellee.

(No brief in the record.)

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

At the regular election in November, 1905, S. Parrish received 2,608 votes for surveyor of Madison county, and W. F. Powers received 2,671 votes. On November 18th the election commissioners issued to Powers the certificate of election, and on November 25th S. Parrish brought this suit to contest the election. The circuit court sustained a demurrer to his petition, and he appeals.

He alleged that he is over 21 years of age; that he is a practical surveyor and civil engineer, and that he had for more than 25 years followed the avocation of surveying; that by a convention regularly called and held by the Republican party of Madison county on September 26, 1905, he was nominated for the office of surveyor; that he accepted the nomination, which by the duly constituted authorities of the convention was acknowledged and certified to the clerk of the Madison county court more than 15 days before the election; that the county clerk accepted

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the certificate, and pursuant thereto caused his name to be printed on the official ballot in the Republican column under its proper device; that the defendant, without any right so to do, wrongfully had his name printed on slips or pasters, and on the morning of the election wrongfully had these pasters attached to the official ballot under the Democratic device by the election officers in all the precincts except two; that in two precincts they refused to allow the pasters to be attached to the official ballot; that Powers' name was not placed on any educational or sample ballot; that the placing of the name of Powers on the ballot by pasting the pasters under the Democratic device was wrongful; that he had never been nominated by any primary election or convention; and that no petition had been filed with the clerk asking that his name be placed on the ballot; that his name had never been certified to the clerk by the constituted authorities of any political party; that no political party except the Republican party had nominated a candidate for the office of surveyor; that the pasters were exactly the color of the regular ballot, and that they were not placed upon the ballot by any county, district, or election official to fill a vacancy on the Democratic ticket caused by the death, removal, or resignation of any candidate; that no electors voting at the election voted for Powers by writing his name on the ballot; that many of the Democratic electors, desiring to vote for all the nominees of the party, only made their cross under the Democratic device, and that this they did unaware of the fact that Powers' name had been placed on the ballot by the pasters; that the placing of Powers' name on the official ballots in this way was a fraud on him and on the electors, and that nearly all voting at the election under the

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Democratic device did not knowingly vote for Powers; that Powers is without qualification for the office of surveyor, in that he is not a surveyor and is not qualified to discharge the duties of the office. He prayed that it be adjudged that he be entitled to the office, and that Powers be adjudged not entitled to it or properly elected thereto.

In Hollon v. Center, 102 Ky. 119, 43 S. W. 174, 19 Ky. Law Rep. 1134, it was held that it is the duty of the clerk to place upon the ballot the name of the person certified as nominated, although the certificate does not state the residence of such person or the residence of the official signing the certificate, unless he demands other proof of the facts required to be stated in the certificate. It was also held in that case that, if the clerk knows personally the facts, he may act upon his own knowledge, in the absence of any contest or dispute. The allegations of the petition are not sufficient to show that Parrish was regularly nominated, and that his nomination was certified to the clerk, as provided by the statute. But the clerk placed his name upon the ballot without dispute or contest. It must now be presumed that the officer did his duty, and that Parrish's name was properly placed on the ballot under the Republican device, as the clerk had the right to act upon his own knowledge. Section 99 of the Constitution provides for the election of a county surveyor. Section 100 provides that no person shall be eligible for the office who is not at the time of election 24 years of age, a citizen of Kentucky, and who has not resided in the State two years and in the county in which he is a candidate one year next precedng the election. The petition does not show that Parrish possessed these qualifications, but it does show that

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he had been nominated for the office by the Republican party, and that his name had been placed on the official ballots by the county clerk. In response to a similar objection as to the sufficiency of the petition in a contested election case this court, in Tunks v. Vincent, 106 Ky. 833, 21 Ky. Law Rep. 475, 51 S. W. 623, said: "We are to bear in mind, also, that the statement that contestant was a candidate of one of the political parties has force, in view of our election laws providing for party nominations. When one is such candidate, he must be presumed to be entitled to have his name go on the official ballot, and is prima facie eligible to the office for which he is a candidate. The mere averment of his candidacy under these circumstances implies eligibilty." We therefore conclude that the petition states facts sufficient prima facie to entitle Parrish to maintain the action. It remains to determine whether the facts stated in the petition are sufficient to constitute a cause of action.

Elections are to be held by secret official ballot. Ky. Stats. 1903, section 1446. The only contingency in which pasters may be used is in case of the death, removal, or resignation of a candidate after the printing of the ballots, and in that event the chairman of the political organization of which the candidate was a member may make a nomination to fill the vacancy and provide the election clerk of each precinct with a number of pasters containing only the name of the candidate. It is the duty of the clerk to put one of the pasters in a careful manner and in the proper place on each ballot before he signs his name to it. In the case at bar the Democratic party had made no nomination for the office of surveyor. The chairman of the Democratic party did not provide the pasters. The pasters were provided by Powers him-

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self. So the case comes to this: That a private person, after the ballots were printed, had his name placed upon the ballots under the Democratic device as though he had been nominated by the Democratic party, when in fact he had not been so nominated and had no right thus to place his name on the ballots. When names are placed on an official ballot as nominees of a political party, the voters of the party have a right to assume that the candidates are the nominees of the party. If such a practice were tolerated as is shown in this case, party nominations would be of little value, and no confidence could be placed in the official ballots as showing correctly who were the party nominees to be voted for at an election. Each political party is not only entitled to control its own nomination, but it is also entitled to have the ballots so guarded that the voters of the party may have confidence in the ballots as expressing truly who are the party nominees. Were the rule otherwise, political nominations would be of little value, and the official ballot would be often actually misleading. The provisions of the statute therefore for the protection of the official ballot must be rigidly enforced. The placing of Powers' name on the official ballot was without right, and an election secured by such means cannot be allowed to stand; for Parrish's friends no doubt understood that he had no opposition, and those who voted for Powers simply by stamping under the Democratic device meant, often, only to vote for the Democratic nominees. The placing of Powers' name on the ballot under the circumstances indicated was a fraud, whether so intended or not.

The question remains: What was the effect of Powers' name pasted upon the ballots, and of the votes

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recorded under the party emblem of the Democratic party under which his name thus appears? Having held that his name was not rightfully on the ballot, it must be disregarded for all purposes. The ballot should be treated just as it was before his name was placed on it, and just as it would have been if his name had not so appeared upon it. Otherwise, the result would be that officers of an election or other persons unauthorized to do so would have it in their power to thus destroy the validity of every election. Suppose the case were thus: That some one else had actually and legally been nominated for the office of surveyor by the Democratic party to be voted for at that election, and that name had been duly certified by the county court clerk and by that official caused to be printed upon the official ballot; and then suppose that appellee and the officers of election, or some other unauthorized persons, had caused pasters to be used and put them over the name of the Democratic nominee, thus leaving Powers' name alone, and that the vote had been just as it was shown in this case—could it be reasonably argued that Powers was elected county surveyor by this method? We think not. But we would hold that the vote under the party emblem was intended as a vote for each nominee under that emblem whose name rightfully appeared there. One cannot be elected to an office, without the knowledge and purpose of the electors, by a mere subterfuge and trick; nor ought the trick to be allowed to interfere at all with the result of the election, if that result can be ascertained fairly by disregarding it. It can be, in this case, fairly ascertained, we think, that the electors intended to vote only for regular party nominees, except where they indicated a different purpose by marking the ballots specifically as provided by

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statute; and inasmuch as Powers was not the nominee either of the party or other wise, and his name had no rightful place on the ballot, its presence ought to be totally disregarded, and the result certified in accordance with the status when his name is eliminated; that is, that appellant received all the votes for the office, and no one received any of the votes opposed to him. Edwards v. Loy, 113 Ky. 746, 68 S. W. 1091, 24 Ky. Law Rep. 20.

In this view of the case, it results that the judgment of the circuit court dismissing appellant's petition must be reversed, and cause remanded for proceedings consistent herewith.

CASE 21.—PROCEEDING BY INFORMATION BY THE COMMONWEALTH AGAINST SMITH & McGUIAR TO RECOVER A PENALTY FOR SELLING SPIRITUOUS LIQUORS WITHOUT A LICENSE.—November 19.

Commonwealth v. Smith & McGuiar

Appeal from Hart Circuit Court.

SAMUEL E. JONES, Circuit Judge.

From a judgment dismissing the proceeding, the Commonwealth appeals—Reversed.

1. Intoxicating Liquors—Unlawful Sale—Owners of Premises—Liability.—Under Ky. Statutes, 1903, section 2572, prescribing a penalty against one in possession of premises on which liquor is sold, etc., unlawfully by any trick or method whatever, partners in actual possession of a drug store, and operating it as such, may be fined for sales of intoxicants

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by themselves, their servants and agents, in violation of the local option law.

2. Same—"Owner in Possession"—Who Is.—The term "owner in possession" of premises, within a statute prescribing a penalty against such persons, where intoxicants are unlawfully sold on their premises, includes a tenant for a term of years, or of any freehold or greater estate.

N. B. HAYS, Attorney General, CHAS. H. MORRIS and D. A. McCANDLESS, Commonwealth's Attorney, for appellant.

H. W. CURLE and J. S. LAY for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

Information was filed in the Hart circuit court by the Commonwealth's Attorney for the district against G. W. Smith and W. A. McGuiar, partners, for a violation of section 2572, Ky. Stats., pronouncing a penalty against the owner in possession of premises on which liquor is sold, disposed of, obtained, or furnished in violation or evasion of law. The charge in the information is as follows: "The plaintiff, the Commonwealth of Kentucky, states and charges that the defendants, G. W. Smith and W. A. McGuiar, partners trading and doing business under the name of Smith & McGuiar, were at all the time hereinafter mentioned, and have been continuously for the past twelve months before the commencement of this action, in the actual possession, use, and occupancy of the hereinafter described premises, to-wit: A certain house situated in the town of Horse Cave, county of Hart and State of Kentucky, known as the Smith & McGuiar drug store, and that said defendant was on the —— day of December, 1905, using, occupying, and controlling said house and premises as a drug store, and on said date, and within twelve months

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before the commencement of this action, spirituous liquors were sold, disposed of, obtained, and furnished in said house, in violation and evasion of the local option law of this Commonwealth, which local option law was then and now is in force in Hart county, to-wit, by bargain and sale as hereinafter set out, namely, that on or about said —— day of December, 1905, the said defendants by themselves and clerks and agents in said house sold spirituous liquor by retail without license so to do, in violation and evasion of the said local option law to Haywood Shirley, to-wit, contrary to the statutes in such cases made and provided, and against the peace and dignity of the Commonwealth of Kentucky, and especially in violation of the provisions of section 2572 of the Kentucky Statutes, and by reason thereof and by virtue of the provisions of said statutes the said defendants, G. W. Smith and W. A. McGuiar, as the persons in possession of said house and premises in which the said liquors were sold at the time of said sale, are liable and bound to the plaintiff in the sum of one hundred dollars each, no part of which has ever been paid. Whereupon plaintiff prays judgment against the said defendants for the sum of one hundred dollars each, and her costs herein and for all proper relief. D. A. McCandless, Commonwealth's Attorney, Tenth Judicial District. C. B. Larimore, County Attorney of Hart County." A general demurrer was sustained to the information, and it was dismissed. The State appeals.

The section of the statutes reads: (section 2572, Ky. Stats. 1903) "The person in possession of the premises on which liquor is sold, disposed of, obtained or furnished in violation or evasion of law. by any trick or method whatever, on conviction, shall be fined

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not less than twenty nor more than one hundred dollars for each offense, and each time such liquor is sold, disposed of or furnished in violation or evasion of law shall be deemed a separate offense under this act against the person in possession of the premises on which said liquor is obtained, furnished or disposed of." The statute is a stringent one. It follows in order other sections of the statute aimed at tricks and devices to evade the law regulating the sale of intoxicating liquors. The owner of real property at the common law was sometimes liable for its illegal use. If let for purposes of bawdry, or if used for such purposes after rental, though rented for innocent purposes, if the landlord had the power to terminate the lease and refused or failed after notice of the unlawful use, he was guilty. Bishop's New Crim. Law, 1090. It may, by statute, be a nuisance for real property to be used as a place for the illegal sale of liquors. Bishop's New Crim. Law, 1117. The owner of the premises is liable for suffering it to become a nuisance, and may be proceeded against. Black on Intoxicating Liquors, 338. Legislation upon this subject has taken a wide range; but its tendency is to fix responsibility upon the owner, or master, as well as the agent, lessee, or servant whom he puts in the position to violate the law. Construed according to the proper rules for interpreting statutes, the section here invoked is in line with a long train of statutes enacted on the same subject which have been upheld as constiutional. This statute is not against the owner who leases his premises, and whose tenants use them for unlawfully selling liquors; but it is against the owner who is in possession of the building or inclosure where the forbidden act is done. The section does not refer to constructive possession, but actual

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possession; where the personal dominion and authority of the owner is actually exercised, where he has the right to control its use, and in fact does so. Bishop on Statutory Crimes, section 132, states the rule of construction thus: "A statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurs with his act, because the common law does not." And in Bishop's New Criminal Law, 345, it is laid down: "While there are permissible variations in the form of the evil in the mind, we should still not forget that there is no crime without some sort of evil intent. Even in statutory offenses, the same as in those at common law, there must be an evil intent, though the statute is silent on the subject. It must be so construed in connection with the common law as, in favor of defendants, to enlarge it by this requirement." Knowledge must precede intent. So, in this statute, it is knowledge, with a kind of assent or permission, a winking at the illegal act of another on the owner's premises which might have been restrained by the owner in possession, that is the gravamen of the offense.

It is idle to say that a tramp perchance might surreptitiously, and unbeknown to the owner, slip into his outhouse, and there illegally sell liquors whereby the ignorant owner would become an offender under the statute. A similar argument was used once upon a time, a long while ago in ancient Bologna where a medical man bled one on a public street who had fallen in a fiit, and was thought by some to be guilty under the Roman law against brawlers, which punished all who let blood in the public streets of the city. 1 Bl. Comm. 60. But the good sense of the ancients which refused to accede to that argument is

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not superior to the wisdom of the rules for construing statutes now, which read into them, when silent, and when necessary to save them from such absurdity as to condemn them, the saving clause as to knowledge or intent, without which the innocent or unoffending might be punishable. The charge in this information is that the owners were in the actual possession of a drug store, and operating it as a drug store, and that they and their servants and agents sold the liquors in violation of the local option law. If they did it in person, they have violated the statute. If they did it by their servants or agents, whom they placed in a position to act for them, the owners, they are not less guilty than if they had done it themselves. As is said in Black on Intoxicating Liquors, 373: "When a master intrusts to a servant the management and control of his business of selling liquor, and he carries it on in the absence of his employer, both may be convicted of keeping and maintaining the tenement." By the same reasoning, partners are liable for the forbidden act to be done by or with the knowledge and assent of either. Id. The defendants in this proceeding will not be convicted for the unauthorized, unknown sporadic act of a trespasser upon their premises. But if they, or if their clerks in the regular course of their business, or if any one, with their knowledge and assent, has sold the liquor charged, in their house, they are guilty of a violation of the statute aimed at speakeasies and blind tigers, always conducted more or less clandestinely, but generally impossible without the knowledge and acquiescence, and indeed procurement of the "owner in possession," which latter expression includes a tenant for a term of years, or of any freehold or greater estate.

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Let the judgment be reversed, and cause remanded for a trial under proceedings consistent herewith.

CASE 22.—SEPARATE PROSECUTIONS AGAINST THE REMINGTON TYPE-WRITER CO., THE WINDISCH-MUHLHAUSER BREWING CO., THE LEXINGTON BREWING CO., AND THE SINGER SEWING MACHINE CO. TO RECOVER A PENALTY FOR FAILING TO USE THE WORD "INCORPORATED" ON ITS ADVERTISING MATTER.—November 22.

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Comth. v. Remington Type-writer Co.
Same v. Windisch-Muhlhauser Brewing Co.
Same v. Lexington Brewing Co.
Same v. Singer Sewing Machine Co.

Appeal from Boyle Circuit Court.

W. C. BELL, Circuit Judge.

From a judgment sustaining special and general demurrer to the petition the Commonwealth appeals—Affirmed on the special demurrer to the jurisdiction of the court.

1. Incorporations—Criminal Prosecutions—Venue.—Ky. Stats., 1903, section 576, declares that every corporation, except a railroad and others named, shall place immediately under its name on all printed or advertising matter used by the corporation the word "incorporated," and that for failure to do so shall be fined as therein prescribed. Civil Code Prac., section 63, requires an action for the recovery of a fine to be brought in the county where the cause of action arose. Ky. Stats., 1903, section 571, requires all corporations, domestic and foreign, to have at least one known place of business

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in the State and an agent thereat on whom process can be served. Held, That a prosecution for a violation of section 576 must be brought in that county in which the corporation had its principal office or place of business, or an agent designated by it for the service of process, without regard to the county in which the printing or advertising may have been circulated or distributed.

2. Constitutional Law—Equal Protection of Laws.—Ky. Stats., 1903, section 576, declaring that every corporation, with certain exceptions, shall place immediately under its name on all printed or advertising matter the word "Incorporated," and that, on failure to do so, shall be fined, is not because of the exemption of those classes of corporations discriminatory, unequal, or partial legislation within the Constitution of the State or the United States; it affecting all similarly situated.

N. B. HAYS, Attorney General, C. H. MORRIS, CHAS. A. HARDIN and WM. J. PRICE for the Commonwealth.

JURISDICTION.

The appellees contend that if any offense was committed by any one of them it was not committed in Boyle county, but in the county where the designated agent upon whom process might be served, was at the time located. We do not accept this view of the case.

AUTHORITIES CITED.

Standard Oil Co. v. Comth., 23 Ky. Law Rep., 302; Jung Brewing Co. v. Comth., 29 Ky. Law Rep., 821; American Snuff Co. v. Comth., 30 Ky. Law Rep., 1373; Comth. v. F. W. Cook Brewing Co. (September, 1907).

CHARLES H. RHODES, JOHN W. RAWLINGS, C. R. McDOWELL and THOS. P. CAROTHERS for appellees.

1. This case should be affirmed because the Boyle Circuit Court had no jurisdiction of the appellee. The cause of action, if any, having arisen in Jefferson county, where the matter complained of was first circulated.

2. It should be affirmed because the statute under considera-

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tion is a violation of the Bill of Rights and the Fourteenth Amendment of the Constitution of the United States.

3. It should be affirmed because said section of the statute (Ky. Stats., section 596) discriminates and does not afford equal protection and equal privileges to all parties alike.

AUTHORITIES CITED.

Criminal Code, sections 11 and 18; Civil Code, section 63; Comth. v. Grand Central Building & Loan Association, 97 Ky., 325; Shelby Tube Co. v. Bingham Gun Co., 40 N. Y. Supp., 871-873; Bill of Rights of Constitution of Kentucky; Fourteenth Amendment of the Constitution of the United States; Bliss v. Chicago, Milwaukee & St. Paul Ry. Co., 64 Am. St. Rep., 484; State of Mo. ex rel. John C. Wyatt v. Thomas R. Ashbrook, 48 L. R. A., 265; Magoun v. Ill. Trust & Savings Bank, 170 U. S. 42 L. Ed., 1036; Gulf, Colorado & Sante Fe Ry. Co. v. W. H. Ellis, by, etc., 165 U. S. and 41 L. Ed. 670; Yick Wo v. Hopkins, 118 U. S., 365-369 (30:220-226); Thomas Connelly et al. v. Union Sewer Pipe Co., 184 U. S. 46 L. Ed., 679; Ex parte Comth. of Va., 100 U. S. 25 L. Ed., 679; Cotting v. Godard, 183 U. S. 46 L. Ed., 79; Ernest Blank v. People of State of Colorado, 65 L. R. A., 424; A. Ruhstrat v. The People of the State of Illinois, 49 L. R. A., 131; Richie v. People, 155 Ill., 98; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill., 16 Am. Rep., 611; State ex rel Galle v. New Orleans, 67 L. R. A., 771; Muglen v. Kansas, 153 U. S. 623, 31 L. Ed., 205; Gordon v. Winchester Building & Loan Association, 12 Bush, 110; Simpson v. Ky. Citizens' Building & Loan Association, 19 Ky. Law Rep., 1176.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

The several appeals presenting the same questions of law will be disposed of together.

The appellees were proceeded against in the Boyle circuit court by separate penal actions brought under authority of section 11 of the Criminal Code of Practice to recover the penalty for a violation of section 576 of the Kentucky Statutes of 1903, reading that: "Every corporation organized under the laws of this

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State, and every corporation doing business in this State, shall in a conspicuous place on its place or places of business, in letters sufficiently large to be easily read, have painted or printed the corporate name of such corporation, and immediately under the same in like manner shall be printed or painted the word 'Incorporated.' And immediately under the name of such corporation upon all printed or advertising matter used by such corporation, except railroad companies, banks, trust companies, insurance companies, and building and loan associations, shall appear in letters sufficiently large to be easily read the word 'Incorporated.' Any corporation which shall fail or refuse to comply with the provisions of this section shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars." The petition against the Remington Typewriter Company averred that it was a foreign corporation, with its designated office and agent upon whom process might be served located in Jefferson county, Ky., and was at the time set out in the petition doing business in this State; that it had printed in a newspaper published and circulated in Boyle county an advertisement without using therein the word "Incorporated." The petition against the Singer Sewing Machine Company alleged that it was a foreign corporation, with its designated office and agent upon whom process might be served located in Jefferson county, Ky., and having also a storeroom and place of business and agents in Boyle county; that it printed and circulated in Boyle county advertising matter in the form of an almanac, styled "The Singer Almanac," but failed to use in connection with the advertisement the word "Incorporated." The petition against the Windisch-Muhlhauser Brewing Company

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alleged that it was a foreign corporation, with a designated office and agent upon whom process might be served located in Campbell county, Ky.; that it caused to be printed advertising matter on official time tables of the Queen & Crescent Railroads, which were circulated in Boyle county. The petition against the Lexington Brewing Company alleged that it was a domestic corporation, with its principal place of business in Lexington, Fayette county, Ky.; that it caused to be inserted in the Lexington Herald, printed at Lexington, Ky., but which circulated in Boyle county, advertising matter without using the word "Incorporated." The lower court in ruling upon special and general demurrers filed to the petitions dismissed them. The special demurrer was sustained upon the ground that the Boyle circuit court had no jurisdiction, and the general demurrer because the statute was unconstitutional. The only question before us is the correctness of this ruling.

It will be noticed that three of the appellees are foreign corporations doing business in this State who have designated in the manner provided in section 571 of the Kentucky Statutes of 1903 the location of their respective offices in this State, and the name of their agents thereat upon whom process may be served, and that the principal office and place of business of the domestic corporation is in Fayette county, Ky. With the exception of the Singer Sewing Machine Company, it is not charged that either of the other corporations had any place of business or agent in Boyle county. As to the machine company, it is averred that it had a storeroom and place of business and agents in Boyle county. In neither of the petitions is it alleged from what point the advertising matter was distributed, or what agent or agents pro-

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cured the insertion of the advertisement or placed the advertising matter in circulation. We therefore assume that as to the foreign corporations the advertising matter was procured to be inserted and printed, and distributed or circulated, by the authority of the corporations acting through their principal agents in the State; that is, by and through their agents located at the places they had designated as their principal places of business in this State, which in the case of two of them was Jefferson county, and the other Campbell county. As to the domestic corporation, its advertisement was inserted in a newspaper published in the county of Fayette, in which it had its principal office and place of business. The provisions of the Civil Code of Parctice govern the service of process and venue of penal actions; section 51 providing that: "In an action against a private corporation a summons may be served in any county upon the defendant's chief officer or agent who may be found in this State, or it may be served in the county where the action is brought upon the defendant's chief officer or agent who may be found therein." And section 63 that "actions must be brought in the county where the cause of action or some part thereof arose * * * for the recovery of a fine, penalty or forfeiture imposed by statute." Observing the requirements of section 51, summons against the sewing machine company and the typewriter company were executed upon their respective agents in Jefferson county, a summons against the Windisch-Muhlhauser Brewing Company upon its designated agent in Campbell county, and a summons against the Lexington Brewing Company upon its chief officer in Fayette county. In view of the fact that section 63, supra, fixes the venue of actions like these, the first question to be

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determined is, in what county did the cause of action arise? as upon the solution of this depends in a large measure the question whether or not the Boyle circuit court had jurisdiction. If under section 576 of the statute the cause of action for its violation arises in any county in which any printed or advertising matter used by the corporation is circulated or distributed, the Boyle circuit court had jurisdiction, as would the circuit court of any other county in the State in which the advertising matter was used. In short, the contention of the Commonwealth is that if a domestic corporation having its office and principal place of business in this State, or a foreign corporation having an established place of business in this State, and an agent or officer thereat upon whom process may be served, inserts in a magazine, newspaper, or other medium for advertising published in or out of the State, it may be indicted or sued in any county in this State in which the magazine, newspaper or other instrumentality for advertising goes. Of course, the number of advertisements posted up or the number of papers circulated or magazines distributed in the county does not affect the question. The liability would be the same if one issue of the paper containing the advertisement happened to find its way into the county. We do not think this a fair or proper construction of the statute. All foreign and domestic corporations doing business in this State are required by section 571 of the Kentucky Statutes of 1903 to "at all times have one or more known places of business in this State, and an authorized agent or agents thereat upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this State until it shall have filed in the office of the Secretary of State

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a statement signed by its president or secretary, giving the location of its office or offices in this State, and the name or names of its agent or agents thereat upon whom process can be served." The place so designated by the corporation is its home in this State, and whatever is done or omitted to be done by the corporation in violation of the statute in question may be traceable to the authority or direction of the persons in charge of its business at its home office. If it inserts and distributes or circulates advertising matter in the State, it may properly be chargeable to the same office. The offense against the statute is committed at the place in this State where the authority or direction to use the illegal advertisement originated. That is where the cause of action arises, and that is the place where the prosecution should be instituted. It will be readily agreed that this principle is sound so far as domestic corporations are concerned; but it is argued that it will not do to apply it to foreign corporations, because it is said, although the foreign corporation may have an established office and place of business in this State, yet the advertising matter might be sent from its office in another State or from some other point than its principal office in this State, and hence the offense could not be deemed to arise in the county where its residence in this State was established, as it was not committed in that county or by the persons there in charge of its business, and that, in prosecutions in that county against the corporation for a violation of this statute, it could successfully make defense upon the ground that, under section 63 of the Civil Code of Practice, no part of the cause of complaint arose in that county. But such a plea or defense would not be available. Neither the foreign nor domestic cor-

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poration will be heard to say that the cause of action or any part of it did not arise in the county where its principal place of business in this State was situated, or in which it had a designated agent for the service of process, or permitted to shield itself from prosecution and punishment upon the defense that the advertising matter complained of was not furnished by or through or distributed from or through the agency of such office. Nor will the Commonwealth in a prosecution for violations of this statute in such county be required to do more than show that the advertising matter in violation of the statute was distributed in that or in some other county of the State. In prosecutions like these, where the venue of the action is involved in some doubt, the court must determine the point. Ingram v. Turner, 51 S. W. 148, 21 Ky. Law Rep. 283. The Legislature did not undertake to localize the offense by declaring it would be committed at the place the advertisement was used. The penalty is denounced against the corporation that acts in violation of the statute. It is said in argument that it is the "use" of the illegal advertising matter that constitutes the offense, and, if it is not "used," the statute is not violated, and hence it follows that the jurisdiction under the Code is in that county in which the advertising is "used," as it is there the offense arises. But the "use" in the meaning of the statute may exist at the place in this State from which the advertising is sent, or directed to be sent out; that is, at its chief office or principal and designated place of business. Indeed, at that point the chief offense is committed, and, although it may be continued in other places, the courts of the county where it originated may properly be given jurisdiction. The pur-

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pose of the statute was, of course, to prevent the use by the corporation of the advertising matter without complying with the law, and, when it has a principal office in this State and a designated place of business, it is fair to assume that the illegal use originated there, and at that place it should be prosecuted. The nature of the "use" of advertising matter is necessarily transitory. There is nothing in or about it that can be said to give it a local situs or habitation. It is here today and there to-morrow. Now in one county, there in another, as the interests of the business may seem to demand. The offense against the statute is more certainly committed where its home office in this State is than in any county where a stray magazine or a fugitive newspaper might find its way, or other kind of advertising be used. In prosecutions for violations like this, it seems to us better for the interest of all parties concerned that the venue should be fixed in one county if it can with propriety be done, so that persons desiring to proceed against the corporation in default may know where to institute proceedings, and the corporation may know in what court it will be proceeded against. We doubt if the Commonwealth would contend that, if an advertisement in violation of the statute was inserted in a newspaper that circulated in every county in the State, prosecutions might be instituted and convictions had in each of the 119 counties. In other words, could not a conviction in one county be pleaded as a bar to the prosecutions in the others? It is not, however, necessary to further elaborate this view. If it should be entertained by the court in a case where it was presented, only one recovery could be had, and this it seems to us should be in the county where its

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principal office or place of business in the State is located, or where its designated officer for service of process resides. Nor will the efficiency of the statute which subserves a useful purpose be impaired by this ruling.

A somewhat similar jurisdiction question came up in Commonwealth v. Grand Central Building & Loan Association, 97 Ky. 325, 17 Ky. Law Rep. 215, 30 S. W. 626. The building and loan association had its principal office and place of business in this State, in Campbell county, and was proceeded against by penal action in the Franklin circuit court for a violation of section 571 of the Kentucky Statutes of 1903; the offense charged being that it carried on business in this State without having filed in the office of the Secretary of State a statement signed by its president or secretary giving the location of its office or offices in this State, and the name or names of its agent or agents thereat upon whom process might be served. The court held that the offense was committed in Campbell county, and that the Franklin circuit court had no jurisdiction, although the acts constituting the violation consisted in failing to file the certificate in Franklin county.

The vigorous attack made on the validity of the law is rested upon the ground that it is unequal and partial legislation, in that it arbitrarily discriminates in favor of railroad companies, banks, trust companies, insurance companies, and building and loan associations by exempting these corporations from its provisions. We do not regard the statute open to the objection urged against it. It is competent for the Legislature to classify persons and things and deal separately with each class, subject to the limitation that the law is not oppressive or unreasonable.

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In the exercise of this power, special and distinct laws have been enacted for the government of railroads, banks, trust companies, insurance companies, building and loan associations, and charitable corporations, and these acts are not objectionable because they deal with each class of corporations in a different manner from that followed with reference to other classes. The diverse business these and other classes of corporations are engaged in would make it impracticable to govern them by a general law, and so long as each is allowed the reasonable and free exercise of the powers granted to it, and is not burdened or harassed by legislation that is unreasonable, it cannot complain. No sound objection can be made to legislation of this character. As said in Cooley's Constitutional Limitations, page 554: "Laws public in their objects may, unless express constitutional provisions forbid, be either general or local in their application. They may embrace many subjects, or one, and they may extend to all citizens or be confined to particular classes, as minors, or married women, bankers or traders, or the like. The authority that legislates for the State at large must determine whether the particular rule shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a single class of its citizens only. These discriminations are made constantly, and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The Legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens." The case of Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup Ct. 431,

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46 L. Ed. 679, relied on by counsel for appellees, does not conflict with the principle announced by Cooley or the views expressed in this opinion. The point disposed of by the court in that case was that the statute condemned discriminated against persons engaged in the same general occupation by denouncing acts of one of the class as criminal, while protecting and upholding the other. The Legislature may in its discretion direct its efforts to one class of citizens, or one business and leave untouched other persons and occupations, or it may impose varying duties or burdens upon separate classes of persons or pursuits, and, so long as they are not unreasonable, the persons singled out will not be heard to question the validity of the enactment merely because like burdens or duties were not required from all the people or all the occupations, professions, or pursuits. Tested by these general rules, the law in question is neither arbitrary, oppressive, nor unreasonable. The duty imposed is simple, inexpensive, and easily performed. Legislation of this character is so common, and is exercised in so many various ways, and operates so differently, that it would be unprofitable to point out the numerous instances of its application found in the statutes and approved by the court. In laws of this character there is really no discrimination for or against any individual or corporation, but persons and corporations engaged in the same occupations, for purposes of public policy and the better protection of the people, are dealt with as a class. It must be apparent to every one that a set of laws intended to control and regulate the banking business would be entirely inapplicable to a corporation engaged in manufacturing typewriters; and an act authorizing persons to form a corporation to sell

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sewing machines would be totally inadequate for the formation of insurance companies or railroads. These illustrations sufficiently show the necessity for legislating differently for corporations engaged in diverse enterprises classifying each corporation separately, and we do not understand that any court has held that this within reasonable limitations may not be done. State v. Mitchell, 97 Me. 66, 53 Atl. 887, 94 Am. St. Rep. 481.

A large part of the commercial and manufacturing business of the country is transacted by corporations, acting through their agents, and the purpose of the statute was to inform the public generally as well as individuals whether or not the concern they were dealing with was a person, partnership, or corporation, so that they might know what property they could look to for the collection of debts or the enforcement of contract rights. In corporations the individual property of the stockholders is not liable for the corporate debts, and in many instances the corporations themselves are not only irresponsible, but insolvent, and motives of public policy induced the enactment of this law, intended for the protection of the people of the State. Jung Brewing Co. v. Commonwealth, 123 Ky. 389, 507, 96 S. W. 476, 29 Ky. Law Rep. 821; Commonwealth v. American Snuff Co., 125 Ky. 350, 101 S. W. 364, 30 Ky. Law Rep. 1373. In line with these reasons, notes, taken by peddlers must be indorsed "Peddlers' notes," and in Bohon's Assignee v. Brown, 101 Ky. 354, 357, 41 S. W. 273, 19 Ky. Law Rep. 540, 38 L. R. A. 503, 72 Am. St. Rep. 420, this court said: "The right to prescribe regulations for the protection of its citizens against fraud and imposition is not taken from the State by the federal Constitution, or by any national statute;

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on the contrary, it may be considered as having been authoritatively settled that the national government cannot exercise police powers for the protection of the inhabitants of a state." Supporting this position are cited numerous cases. In Schoolcraft's Adm'r v. L. & N. R. Co., 92 Ky. 233, 17 S. W. 567. 13 Ky. Law Rep. 517, in considering the rights of representatives of a person not in the employment of the railroad company to recover punitive damages where his death was caused by the wilful neglect of the corporation, the court, in answer to the argument that it was discriminatory and unequal legislation, said: "Such a statute affects all similarly situated. It imposes the same burden upon all in a like business, and therefore affords equal protection. While in a broad sense of the term it is special legislation, yet it is not of such a character as to fall within the constitutional inhibition." The propriety of exempting banks, railroads, trust companies, insurance companies, and building and loan associations from the operation of this law might also be safely placed on the ground that the business these corporations are engaged in cannot be conducted except by corporations. An individual or partnership cannot under the statute establish or operate a railroad, bank, trust company, insurance company, or building and loan association. Every person who deals with them knows they are corporations, and hence there is no necessity or reason why they should be required to place upon advertising matter notice of this kind. The protection of the public or persons dealing with them does not make it important that this should be done. But a dry goods store, grocery, hardware establishment, or any other lawful business—excepting those heretofore mentioned—may be carried on

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by an individual, partnership, or corporation. The classification and exemption mentioned in the statute is not discriminatory, unequal, or partial legislation in the meaning of the Constitution of the State or the United States, but prosecutions under it must be in that county in which the corporation has its principal office or place of business in this State or in that county where it has an officer or agent designated by it for the service of process.

The ruling of the lower court in sustaining the demurrer to the jurisdiction was correct, and the judgment in each case is affirmed.

CASE 23.—SUITS BY THE CITIZENS' NATIONAL BANK OF LEBANON, AND BY THE FIRST NATIONAL BANK OF LEXINGTON AGAINST S. W. HAGER, AUDITOR, AND OTHERS TO ENJOIN THE ASSESSMENT OF BANK STOCK FOR TAXATION FOR THE YEAR 1906.—November 22.

Hager, Auditor, &c. v. Citizens' Nat. Bank of Lebanon

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Appeal from Franklin Circuit Court.

R. L. STOUT, Circuit Judge.

Judgment for plaintiffs, defendants appeal—Reversed.

1. Taxation—National Banks—Nature of Assessment—Act Construed.—In January, 1906, the court of appeals held that there was a discrimination against national banks in the method of assessing them and state banks, since state banks under existing laws, being assessed upon their capital and assets, so much of their capital as was invested in federal

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bonds was not taxable, while national banks being assessed on their shares of stock, the value of such bonds in which their capital was invested was not deducted, and the court held such deduction should be allowed. Immediately thereafter the act effective June 11, 1906 (Laws 1906, p. 134, ch. 22, subd. 2), was enacted, and provides that an annual tax of the same rate as fixed upon other personalty for State purposes shall be imposed upon the value of the shares of the banks. Held, That such act provides for an assessment of the shares of stock of national banks and not for an assesment of their assets, which would be in express violation of the national banking act (Act June 3, 1864, ch. 106, 13 Stat. [U. S. Comp. St. 1901, p. 3454.]).

2. Same—Act Governing Assessment.—The act of June 11, 1906 (Laws 1906, p. 134, ch. 22, subd. 2), governed the assessment for that year, since it was the legislative purpose to supersede the old law and have future assessments made under the new act, so that no loss would result to the State through the decision of the court of appeals rendered in January.

3. Same—Delay in Assessment—Effect.—As the act under which the national bank shares were assessed for 1906 did not permit any discrimination against them, or impose any rate of taxation greater than was assessed upon other moneyed capital, they may not complain of a delay in the making of the assessment for that year.

4. Same—Information for Assessment—Source—Materiality.—Where, in a suit by a national bank to require the state board of valuation and assessment to deduct the value of federal bonds held by it from an assessment for a given year, it does not claim that its shares were fixed at too high a valuation, nor show that it has attempted to obtain a reduction of the assessment, nor that any prejudicial error was committed in the manner of valuing the shares, except in failing to deduct the value of federal bonds, it is immaterial what information the board used in making the assessment.

5. Same.—In a suit by a national bank to require the state board of valuation and assessment to deduct the value of federal bonds held by it from an assessment on its shares for State taxes in 1906, it is immaterial in what manner local assessments were made in that year upon such shares for purposes of counties, etc., or when they were made or when the taxes were paid thereunder, since the state board, under the express terms of the act effective June 11, 1906 (Laws 1906, p. 134, ch. 22, subd. 2), had no power to make assess-

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ments for counties, etc., and was limited solely to assessments for State purposes.

6. Same—Taxes Upon Shares—Liability of Banks.—A bank may be required to pay taxes imposed upon the shares of its stock, having a right to enforce reimbursement from the shareholders.

7. Same—Information for Assessment—Right to Compel Bank to Give.—Since a bank may on behalf of its shareholders pay taxes due by them on their shares and recover from them the amount paid, the bank may be required to furnish information upon which the assessment of the shares may be made, so that all the shares may be taxed alike.

Chief Justice O'Rear and Judges Barker and Lassing dissenting.

N. B. HAYS, Attorney General, CHAS. H. MORRIS and JOHN W. RAY for appellant.

CONCLUSION.

1. Within the restrictions that the rate of taxation shall not be greater than that imposed upon other moneyed capital in the hands of the individual citizens of this State, and that the non-resident shareholders of the appellee shall be assessed at the place where the bank is located, and not elsewhere, as required under section 5219 of the United States, the power of the legislature to impose taxes upon the shares of the appellee bank is unlimited, and any tax which keeps within these restrictions, impairs no federal right of the appellee bank.

2. The shares of the appellee bank do not fall within the list of property named in section 170 of the State Constitution which is exempt from taxation, and by the mandate of said section of the State Constitution, the General Assembly has no power to pass any law exempting or commuting the shares of the appellee from taxation.

3. Under the mandate of section 171 of the State Constitution, it is mandatory upon the legislature to provide by law an annual tax which shall be uniform upon all property subject to taxation.

4. By the mandate of section 172 of the State Constitution under the law as required to be enacted by section 171 of the State Constitution, all property shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer of the board of valuation and assessment, appellants herein, who are authorized and whose duty it is to make said assessment, who shall fail so to do, shall

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be guilty of a misfeasance and subject to removal from office.

5. It is the contention of the State, that no shareholder of the appellee, or any corporation or individual, can have any vested right under this Constitution in non-payment of a uniform rate of taxation for any year past or future; and that in order to comply with this constitutional mandate, the whole revenue law of this State is both retroactive and prospective in its application for the assessment and collection of taxes; and that the sections of Kentucky Statutes hereinbefore set out, to-wit, 4064, 4120, 4124, 4241 and 4090, are all retroactive in their application and have been so construed by this Court, and have been re-enacted in the present law of 1906, and that therefore, the whole revenue law of 1906 is both retroactive and prospective in its application to the assessment and collection of taxes as hereinbefore stated.

We, therefore, earnestly insist that whether the board of valuation and assessment acts under the method provided under the Act of 1906, or under the general revenue law of which it is but a part, that the board of valuation was vested with the power, and that it was its duty under the Constitution and the law to assess the shares of the appellee bank; and that this case should be reversed and remanded to the lower court with directions to sustain the demurer and dismiss the petition.

T. L. EDELEN for appellees.

J. D. & G. R. HUNT, JOHN T. SHELBY, JOHN McCHORD, JAMES P. HELM, ALEX P. HUMPHREY, HENRY BURNETT, PENDLETON & BUSH and YEAMAN & YEAMAN of counsel.

POINTS AND CITATIONS.

1. The state board of valuation and assessment had no election whether the old act or the act of 1906 was in force at the time it made the tentative assessment of June 12, 1906. (Constitution, section 60.)

2. In two provision of the old law, (1) that taxes must be paid by July 1st under a heavy penalty, and (2) that the bank has thirty days within which to protest against the tentative assessment, conclusively fix the date for the tentative assessment prior to the first of June in each year. No intentional postponement or negligent failure to perform this duty could possibly affect the rights of the banks which had duly made their reports under existing law.

3. It being the duty of the board of valuation and assessment to have these assessments under the old law, the ruling of this

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court in the case of Marion National Bank v. Burton, sheriff, and Citizens' National Bank, against same, 28 Ky. Law Rep., 864, that the banks had a right to deduct the value of their government securities, is conclusive against the merits of this appeal.

4. The board of valuation and assessment, both under the provisions of the act itself and as admitted by the demurrer to the reply, adopt a taxation upon the assets of these appellees, and therefore the assessment was invalid, if not, then the deduction of government bonds was the only alternative.

5. Unless the old act was in force at the time these assessments were made, there could be no assessment for municipal purposes in cities of the second, third or fourth class.

6. If the assessment of June 12, 1906, be deemed a retrospective assessment, it must conform to the law in force during the period covered.

7. The act of 1906 is invalid as to national banks, because it is a taxation of their assets. Savings Bank v. Des Moines, 205 U. S., 503, and citations.)

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

These two appeals, presenting the same questions, will be disposed of together. The pleadings and evidence in each case being alike, we will use and refer, in the course of this opinion, to the record in the Case of Citizens' Bank of Lebanon.

The appellee by petition in equity sought to enjoin the appellants, who constitute the state board of valuation and assessment, from assessing its shares of stock for the year 1906 in the manner contemplated by the board, or from making any final assessment for that year, or, if that relief could not be granted, that it be enjoined from making any assessment without deducting the value of the United States bonds held by it; the relief really sought being to require the board of valuation and assessment to deduct the value of the United States bonds held by the bank. The petition charged that between Sep-

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tember 1, 1905, and March 1, 1906, the bank under and pursuant to an act approved March 21, 1904, made and delivered to the Auditor of Public Accounts of the Commonwealth a report made in conformity to the act, furnishing all the information required by it, including the amount of the United States bonds owned by the bank. It owned on September 1, 1905, United States bonds to the amount of $75,000, which bonds had been purchased out of its capital stock and surplus. It further averred that the act of 1904 was repealed by an act of March, 1906, which went into effect on June 11, 1906; but that the state board of valuation and assessment on June 12, 1906, the day following the date when the act of 1906 became a law, made an assessment of the property of the bank upon its shares of stock, and, after ascertaining the value of its shares, deducted therefrom the amount of tangible property which was locally assessed by the assessing authorities of the county in which the bank was located, found the balance of its property to be $123,634. It avers that this assessment made by the board of valuation and assessment was wholly without authority in this: "(1) That it was made by the board of valuation and assessment on June 12, 1906, after it had lost all power to make any assessment under the report which had been theretofore filed on account of the repeal of the law under which the report was made. (2) If the plaintiff is mistaken in this, said report is erroneous, in that it wholly fails to credit the plaintiff by the amount of government bonds owned by it and which were shown by the report aforesaid."

With the petition is filed an exhibit that illustrates the method pursued by the board of valuation and

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assessment in assessing the shares of stock. It reads as follows:

"Frankfort, Ky., June 12, 1906.

"Citizens' National Bank of Lebanon, Ky.

"You are hereby notified that the state board of valuation and assessment after due consideration of the report made to the Auditor September 1, 1905, has fixed the value of the shares in your bank as follows, to-wit.:

Capital stock	$100,000 00
Surplus	25,000 00
Undivided profits	3,500 00
Total assets	128,500 00
Number of shares	1,000 00
Value per share	128 00
Total value of shares	128,500 00
Tangible property deducted	5,136 00
Net amount subject to taxation	123,364 00
Amount of tax	612 82

To this petition appellants answered in two paragraphs; the first one being merely a traverse of the petition, the second averring that the assessment made by the board of valuation and assessment was duly authorized and the values fixed by it as shown in the exhibit correct. Afterwards an amended answer was filed, setting up "that the defendants, as the board of valuation and assessment, assessed and fixed the taxable value of the shares of all national banks, state banks, and trust companies in the State of Kentucky on June 12, 1906, and that said valuation so fixed and said assessment were made under an act of the General Assembly which became effective on June 11, 1906 (Laws 1903, p. 134, c. 22, subd. 2); that said board in arriving at the taxable value and assessment of the shares of all national banks and

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state banks and trust companies took the capital, surplus and undivided profits of said national banks and state banks and trust companies, and from that deducted the real estate owned by said national banks, state banks, and trust companies, and that left the total value of said banks and trust companies, which were assessed by the state board of valuation and assessment, and that said board used exactly the same method in the valuation and assessment of all shares of national banks, state banks, and trust companies in the State." In a reply, appellee denied that "the valuation and assessment in controversy were fixed or made under an act of the General Assembly which became effective June 11, 1906; and, further, that even if the act of 1906 was in force and operative as to the valuation and assessment for the year 1906, and it was the legislative intent that said valuation and assessment should be made under the same, yet the said act did not authorize any assessment or valuation of the shares of stock in the plaintiff bank, because, while said act purports to provide for an assessment of the shares of all banks and trust companies, it really, in substance and effect, provides for a system of taxation of the assets themselves of all banks and trust companies, and is therefore unconstitutional and void as to national banks as being in conflict with the provisions of the act of Congress known as the 'National Banking Act' (Act June 3, 1864, c. 106, 13 Stat. 99 [U. S. Comp. St. 1901, p. 3454]), and states that the method of assessment which was made by the board was an assessment of the assets and property of the bank, and that, by the adoption of this method, the board assessed the plaintiff's assets and property for taxation." No responsive pleading was filed to this reply,

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nor was it necessary there should have been, as the reply presented simply a law question, the correct solution of which depends upon the proper construction of the act of 1906; that is, whether it provides for the assessment of the shares of stock or the capital stock and assets of the bank.

The deposition of the Auditor of Public Accounts, who is chairman of the board of valuation and assessment, was taken, and from it it appears: (1) That the board of valuation and assessment fixed the taxable valuation of the shares of national banks, state banks, and trust companies for 1906 on June 12, 1906. (2) That in arriving at the taxable valuation of the shares of this bank the board took the capital, surplus, and undivided profits, and from that deducted the real estate owned and assessed by it, which left the total value of the shares which were assessed by it. (3) That exactly the same method was pursued in ascertaining the value of the shares and fixing the assessment of state banks, national banks, and trust companies. (4) That the state banks and trust companies have accepted the valuation placed upon their shares, and have paid their taxes. (5) That none of the state banks or trust companies reported that they held or owned any government bonds; or, if they had so reported, the board would have declined to deduct the value thereof in fixing the assessments. (6) That the assessment referred to was made from information furnished by reports made as of the 1st of September, 1905, by national banks, and as of the 31st of December, 1905, by state banks and trust companies, which reports were filed before the 1st day of March, 1906. (7) That no effort was made to acquire any information concerning the value of the shares of stock or prop-

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erty, except as it was shown in the reports. At this point it is convenient to state that by an act that became a law June 17, 1902, all banks and trust companies were required to make and deliver to the Auditor of Public Accounts reports showing, among other things, the capital stock, the number of shares, the highest price at which the stock was sold within 12 months, the amount of the surplus fund and undivided profits, and the value of other assets, as well as the amount of indebtedness, and gross and net earnings or income, and the amount and kind of tangible property. This act applied to all banks and trust companies without specifically mentioning national banks. In 1902 another act was passed (Acts 1902, p. 312, c. 128), now section 4092a of the Kentucky Statutes of 1903, providing that "the shares of stock in each national bank in this State shall be subject to taxation for all state purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located." Section 4092b: "For the purposes of taxation provided for by the next preceding section, it shall be the duty of the president, and cashier of the bank, to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the banks shall be and remain liable to the State, city, town, and taxing district for the taxes upon said shares of stock. * * *." Section 4092c: "All assessments of shares of stock contemplated by the two preceding sections of this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate

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are certified for collection of taxes thereon. The assessment of said shares of stock and collection of taxes thereon as is contemplated herein may be enforced as assessments of real estate and collection of taxes thereon may be enforced." Under these acts of 1902, the taxation was upon the assets and property of state banks and trust companies, and they were assessed by the state board of valuation and assessment; but national banks were assessed upon their shares of stock by the assessing officers in the respective localities where the bank was situated. In 1904, by an act approved March 21st (Laws 1904, p. 145, c. 66), national banks were required to file with the Auditor of Public Accounts annually on or before March 1st reports made up as of the 15th day of the preceding September; and, in order to determine the value of the shares of the national banks and to assess them for state purposes and for purposes of taxation in each county, city, town, and taking district, it was made the duty of the chief officer to show in the report required to be filed the number of shares of stock, and par value of each share, the amount of surplus fund and undivided profits, the amount or value of all the real estate, the amount of United States bonds, the amount of its deposits, loans, and discounts, and such other information as the Auditor of Public Accounts might require. Upon these reports the state board of valuation and assessment fixed the value of the shares of national banks. But each bank was entitled to have deducted from the total valuation placed on its shares by the board the assessed value of its real estate. This real estate it was the duty of national banks to list with the assessor of each county, and pay the taxes thereon to the sheriff. After final action by

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the board, the Auditor of Public Accounts certified to the various counties where national banks were located the value of the shares of the banks, less the assessed value of the real estate, and upon this valuation of the local taxing district collected their taxes. No change was made by the act of 1904 in the method of assessing state banks and trust companies. They continued to be assessed under the act of 1902 until the act of 1906 became effective. In January, 1906, in the case of Marion National Bank v. Burton, Sheriff, 121 Ky. 876, 90 S. W. 944, 28 Ky. Law Rep. 864, this court, in conformity to the rule announced by the Supreme Court of the United States in numerous cases, held in an action involving the right of the bank to have a deduction on account of the United States bonds owned by it in which its capital and surplus had been invested that there was a discrimination in law, if not in fact, against national banks in the method of assessing state banks and national banks, in this: that state banks under the act of 1902 were assessed upon their capital and assets, and, being so assessed, so much of their capital as was invested in the bonds of the United States was not subject to taxation, while, in the case of national banks, the assessment under the act of 1904 being upon the shares of capital stock, the bonds of the United States in which the capital of these banks was invested was not deducted, and for this reason there was a discrimination in law against national banks, and their contention that they should be allowed to deduct the value of the United States bonds held by them was upheld.

To conform to this opinion and remove the discrimination in law that existed between the manner of assessing state banks and trust companies and

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national banks, it was provided in subdivision 2 of an act that became a law June 11, 1906, that: "An annual tax at the same rate which may be fixed by law upon other personalty for state purposes is hereby imposed upon each one hundred dollars of value of the shares of state banks and trust companies incorporated under the laws of this Commonwealth, and of national banks doing business therein, and such tax shall be paid to the Treasurer of the State annually by such banks and trust companies for and on behalf of the owners of such shares of stock; and in addition thereto the said banks and trust companies shall pay to the local authorities in counties, cities, towns and districts, taxes at the same rate imposed upon other personalty therein." Section 2: "In order to determine the value of the shares of such trust companies, state and national banks, and to assess all shares in such state and national banks and trust companies for state purposes, it shall be the duty of the president, cashier or other chief officer of each state bank, trust company and national bank in this State, annually, between the first day of September and the first day of March, to make and deliver to the Auditor of Public Accounts a statement, verified by its president, cashier or other officer, in such form as the Auditor may prescribe, showing the following facts, to-wit: the name and postoffice address of the bank or trust company, the names of the officers, the number of shares of stock and the par and market value of each share; the amount of surplus fund and undivided profits; the amount of value of all real estate situated in this Commonwealth, held and owned by the bank or trust company on the first day of September of each year; the amount of its loans and discounts; the

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amount of its deposits, and such other information as the Auditor may require."

It was further provided by this act that the Auditor of Public Accounts should, after the state board of valuation and assessment had fixed the value of the shares, furnish to each bank and trust company a statement of the value so fixed and the amount of tax due to the State thereon, and that the bank should have 30 days from the day of receiving such notice to go before the board and ask for a change in the valuation, which the board might grant upon hearing evidence. The act also provided, in section 3, that: "Each bank and trust company shall be entitled to have deducted from the total valuation placed on its shares by said board the assessed value of its real estate in this State. It shall be the duty of the trust companies and banks to list with the county assessor of each county and with the assessing officer in each city, town and taxing district, its real estate and pay the taxes thereon to the sheriff, and to the collecting officer in each city, town and taxing district." Section 4: "Every state bank and trust company incorporated under the laws of this Commonwealth, and every national bank doing business therein, shall make to the assessing officer of the county, city, town or taxing district a report similar to that required by this subdivision to be made to the state board of valuation and assessment for assessment for state purposes. The assessing officer of the county, city, town or taxing district wherein any trust company, state or national bank is situated, shall assess the shares of such banks and trust companies for taxation for county, city, town and taxing district purposes in the manner prescribed in this subdivision for assessing the same by the state board of valua-

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tion and assessment for taxation for state purposes; and such officer shall make out and return the assessment to the proper authorities of the county, city, town or taxing district at the same time and manner as prescribed by law for the return of the assessment of personal property." Section 5: "All laws or parts of laws in conflict or inconsistent with this act, providing for other methods of taxation of shares of national banks or the taxation of trust companies and state banks incorporated under the laws of this Commonwealth, in the collection of taxes thereon, are hereby repealed." It will thus be seen that the act of 1906 provided for the assessment of the shares of stock in all state and national banks as well as trust companies; and, further, that by this act no substantial change was made in the manner of assessing national banks; the change being made only in the method of assessing state banks and trust companies. In brief, this act provided that state banks and trust companies should be assessed in the same manner as national banks had been assessed under the act of 1904. It will also be noticed that the state board of valuation and assessment only assesses shares for state purposes—the county, city, town, or taxing district authorities in which the bank or trust company was situated assessing its shares for local purposes. Under this act precisely the same method was adopted for the assessment of state and national banks and trust companies, both by the state board of valuation and assessment for state purposes and the local authorities for local purposes.

Two questions are presented by this record: First. Does the act of 1906 govern the assessment of state banks and trust companies and national banks for the year 1906, and were they assessed under that act,

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or should the assessment for 1906 have been under the laws in force prior to 1906? Second. Assuming that the assessments were rightfully made under the act of 1906, does that act provide for an assessment of the shares of stock or an assessment of the capital stock and assets of the bank? In considering these questions, we will first take up and dispose of the second one.

The argument for the banks in support of their position is that the act of 1906, although nominally an assessment on the shares of stock, is in fact an assessment of the capital stock and assets of the bank; and this contention is chiefly rested upon an opinion of the Supreme Court of the United States in Home Savings Bank v. Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901, construing a statute of the State of Iowa which is said to be in substance and effect the same as our act of 1906. This case came up upon the complaint of a state bank, which insisted that it had the right to a deduction of the amount of the United States bonds held by it, upon the ground that it was assessed upon its capital stock and assets, and not upon its shares of stock. In the course of the opinion, which will be further noticed, the court held that if the assessment was upon its capital stock and assets, and not on its shares, it was entitled to the relief asked; and, having reached the conclusion that the assessment was upon the capital stock and not the shares of stock, declared that the bank had the right to the deduction claimed. The Iowa statute (section 1322) provided: "Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. Shares of stock of state and savings banks, and loan and trust companies, shall be

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assessed to such banks and loan and trust companies, and not to the individual stockholders." At the very outset, it will be noticed that the Iowa statute expressly provided that the shares of stock should be assessed to the banks, and not to the individual stockholders, while our act of 1906 declares in unequivocal terms that the tax is imposed upon the shares of stock, and shall be paid by the banks for and on behalf of the owners of the shares, and, further, that the Iowa law did not give the bank any right to recover from the stockholders the tax paid, while our acts does. These marked distinctions that go to the very heart of the matter are, we think, sufficient in themselves to show that the meaning and effect of the act of 1906 cannot be measured or judged by the construction placed upon the Iowa statute, and this is made plain by the opinion of the court, construing this statute, in which it is said: "A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax on the shares of stock. The assessment is expressed to be upon * * * 'shares of stock of state and savings banks, and loan and trust companies'; but the true interpretation of the law cannot rest upon a single phrase in it. * * * We must inquire whether the law really imposed a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation and by that standard taxes that property itself. * * * Looking then further into the law, it appears that the shares are to be 'assessed to such banks,' * * * and not to the individual stockholders. When this is read, the doubt instantly arises whether the law intended to tax the corporation for property which it does not

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own, but which, on the contrary, is owned by the stockholders. * * * By section 1322 national bank shares are assessed to the stockholders, and by section 1325 the corporations are made liable to pay the tax and are secured by a lien on the stock and dividends, which may be enforced by a sale. The state banks and corporations are excluded ex industria from this statutory right of reimbursement by confining it to the case of taxes assessed to the stockholders of taxes assessed to the stockholders of such corporations. This cannot include the case of state bank shares which are not so assessed. Nor can the corporations in the case at bar have by any possibility a common-law right to recover the tax paid from the shareholders. The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt, and not that of others, and there is nothing in such a payment from which the law can imply a promise of reimbursement. These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt, unless it is supposed that the law requires them to pay taxes upon property which they do not own, or the taxes must be regarded as taxes upon the property of the banks. A fair interpretation of the law is that the taxes are upon the property of the bank." This decision is placed upon the ground that, not only the letter, but the fair meaning, of the Iowa statute imposed a tax upon the capital of the bank, and not upon the shares of stock, and did not give the bank any right to recover from the shareholder the tax paid upon his shares of stock; and hence it was entitled to the exemption claimed. If we are permitted to inquire into the legislative intention in the enactment of the act of 1906 (2 Suther-

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land on Statutory Construction, section 471), it is manifest that the purpose was to impose a tax upon the shares of stock, and not upon the property of the bank. When the opinion of this court in Marion National Bank v. Burton, Sheriff, supra, was handed down in January, 1906, the General Assembly was then in session. The defect in existing laws with reference to the taxation of banks was clearly pointed out in the opinion, which also indicated the manner in which the law could be changed, and quickly following this opinion the statutes were amended to conform to it; and also to place national banks upon exactly the same footing as state banks and trust companies so far as taxation was concerned. So that there can be no doubt about what the Legislature intended and attempted to do.

The next inquiry is, did they succeed in accomplishing this purpose? We think it is fair to give this statute such a construction as will effectuate the legislative intent if it can be done. That it can be a plain reading of the statute leaves no room to doubt. It expressly imposes the tax upon the shares of stock, and provides that the tax shall be paid by the bank for and on behalf of the owners of the shares, and that banks may be required to pay taxes imposed upon the shares of stock is settled in Home Savings Bank v. Des Moines, supra, where the court said: "It, however, is not an uncommon, and is an entirely legitimate, method of collecting taxes to require a corporation as the agent of its shareholders to pay in the first instance the tax upon shares as the property of their owners, and look to the shareholders for reimbursement. * * * The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves as the debt,

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not of them, but the shareholders, leaving to the corporation the right to reimburse itself for the taxes paid for their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another at his request can recover the amount from him."

Nor do we think there can be any question that under the act of 1906 the bank paying the tax may recover from the shareholder the amount paid for him. It provides that the tax shall be paid by the bank "for and on behalf of the owners of such shares of stock;" and, when the bank in obedience to the mandate of the statute pays for and on behalf of its shareholder the taxes due by him upon his shares of stock, the law imposes an obligation upon the shareholder to repay to the bank the amount so paid for his use and benefit, and upon this obligation raised by law the bank may sue and recover. It is true that the value of these shares of stock is ascertained from data required to be furnished by the bank, and upon this information the assessment is made, but, if the Legislature is denied the power to fix the value of shares of stock in corporations upon information furnished to the assessing authority by the officers of the corporation, it would be wholly impracticable to fix with fairness and equality the value of the shares of stock. Our Constitution provides in section 172 that "all property not exempted from taxation by this Constitution shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale," and in section 174 that "all property whether owned by natural persons or corporations shall be taxed in proportion to its value." Under these sections it is made the imperative duty

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to assess all kinds of property, including shares of stock in corporations, at its actual value. It would be easy for assessing authorities to ascertain from corporations or other sources the number of shares, and their par value; but, if they had a market value in excess of the par value, this could not be ascertained except by the information required by the statute, which can only be furnished by the corporation. Under this method, the shares of each stockholder are assessed at the same value and taxed alike; while, if each individual shareholder was required to list his shares for taxation, there would probably, we might say certainly, be inequality in the valuation fixed by each shareholder. Aside from this, it would result in great inconvenience to the taxing authorities as well as loss of revenue to the State, as it frequently happens that shareholders in a single corporation are scattered through the State, many of them often being nonresidents. We therefore have no hesitation in concluding that as the bank may for and on behalf of its shareholders pay the taxes due by them upon their shares of stock and recover from them the amount so paid, so is it allowable to require it to furnish information upon which the assessment of these shares may be made, to the end that all the shares may be taxed alike, and each shareholder bear no more than his fair burden of taxation. Any other rule would necessarily result in inequality and injustice, and deny to the State the right to assess shares of stock in corporations at their fair market value, or to exact from shareholders the same amount of taxation imposed against other property in the State. This view has been expressly upheld by the United States Supreme Court in First National Bank v. Chehalis County, 166 U. S. 440, 17 Sup. Ct.

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629, 41 L. Ed. 1069. There it was contended that an assessment and taxation of all the shares of stock of a national bank to the bank direct as owner thereof constituted a tax upon the bank forbidden by the national banking act. The act under which the tax in question was assessed provided: "Every individual, firm, corporation or association of persons carrying on a general banking business in this State * * * shall be assessed * * * in the following manner. Annually at such times as provided for listing property for taxation in such bank or banking association as contemplated in this section shall by its accounting officer furnish the county or city assessor a statement verified by oath, giving the amount of capital stock, the amount or surplus or reserve fund, and the amount of undivided profits of such bank or banking association. The aggregate amount of capital, surplus and undivided profits shall be assessed and taxed as other like property in the State is assessed and taxed. Provided, at the time of listing the capital stock the amount and description of its local authorized investments in real estate shall be assessed and taxed as other real estate is assessed and taxed under this act—and the assessor shall deduct the amount of such investments in real estate from the aggregate amount of capital, surplus and undivided profits, and the remainder then taxed as above provided. Each bank and banking association shall be liable to pay any taxes assessed against them as the agent of each of its shareholders, owners or owner, under the provisions of this act, and may pay the same out of their individual profit account or charge the same to their expense account, or to the accounts of such shareholders, owners or owner in proportion to their

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ownership.'* The similarity between that act and our act of 1906 in respect to the manner of arriving at the value and assessing the shares is so obvious as not to need further consideration. Nor does the fact that it in terms points out how the bank may recover from the shareholder the amount of tax paid for him constitute any distinction because the unequivocal right of recovery exists under our act, although not given in express terms.

In respect to the contention that trust companies and banks were not and could not have been assessed under the act of 1906, but should have been assessed under the acts of 1902 and 1904, we may remark at the outset that there is no pretense that the act of 1906 discriminates against national banks. It provides for identically the same method of assessing state banks and trust companies as national banks. We entirely agree with counsel for appellants that, if under the law it was the duty of the state board of valuation and assessment in fixing the value of the assets of state banks and trust companies to deduct from such value nontaxable securities, it became its duty in valuing the shares of national banks to make a like deduction; and that the state board of valuation and assessment could not answer a demand of the national banks to deduct from the total value of their shares the amount of their nontaxable securities by saying that, although the law required them to make such deduction from the state banks and trust companies, yet as a matter of fact they had not made it. Nor is it material in the course of this inquiry whether they held any such securities or not, as, if they were entitled in law to claim the exemption, national banks would be entitled to like advantage. This point was expressly decided in the Marion

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National Bank case, heretofore mentioned. It is, however, an undisputed fact worthy of notice that the shares of state banks and trust companies were assessed under the act of 1906, and the corporations paid the taxes so assessed, and were not allowed or entitled to deduct the value of nontaxable securities held by them. In truth, as aptly said by counsel for the State, the national banks are seeking to escape their just measure of taxation and the same imposed upon state banks, and, in place of being discriminated against, are seeking to obtain a discrimination in their favor as against state banks and trust companies. When the act of 1902 was in force, state banks and trust companies were assessed under it, and the national bank insisted that this act gave the state banks and trust companies benefits and exemptions that national banks were not entitled to, but, when this law was repealed and the advantage allowed state banks removed, it would seem to follow that the objection of the national banks should also be removed. As the assessment was made on June 12th, the day after the act of 1906 went into effect, it is, of course, apparent that the assessment was not made upon reports furnished under the act of 1906, but under reports furnished under the act of 1904. At the time the assessment was made, all prior acts had been expressly repealed by the act of 1906. Hence, if the board of valuation and assessment made any assessment at all, it must have been made under this latter act. But, when it is considered that the appellee banks do not maintain that the valuation of their shares was fixed at too high a price, or to show they have made any effort to obtain a reduction in the amount of assessment, or that any error to their prejudice was committed in the manner of valuing

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their shares, except in the failure to deduct United States bonds, we regard it as immaterial what information the state board of valuation and assessment had before it in making the assessment. This inquiry would be pertinent if the valuation fixed or the method of assessing it was assailed.

A good deal is said in argument on both sides upon the question whether or not the act of 1906 had a retrospective effect. Counsel for the State insist that it did, while counsel for the bank as earnestly argue that it did not. In our opinion it is not necessary to give the act of 1906 a retrospective effect in order to sustain the assessment made in 1906. The act of 1906 was a remedial statute, enacted for the purpose of curing defects in prior laws, and to place all banking institutions in the State upon exactly the same footing so far as taxation was concerned, and must be liberally construed to effectuate its intention. Under the decision of this court in the Marion County Bank cases, the Legislature was confronted with the situation that, under the laws as they then stood, the shares of national banks would not be taxed as other moneyed capital invested in state banks and trust companies, but the latter would, in fact, be discriminated against, as they did not hold national bonds. Knowing that this discrimination would exist if the taxes payable in 1906 were assessed under the existing law, the Legislature undertook to change the law. There were the same reasons for changing it as to the year 1906 as to subsequent years. So, in the first section of the subdivision of the act, relating to banks and trust companies, it provided as follows: "An annual tax at the same rate which may be fixed by law upon other personalty for state purposes is hereby imposed upon each one

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hundred dollars of the shares of state banks and trust companies incorporated under the laws of this Commonwealth and of national banks doing business therein." The purpose was to supersede the old law. The taxes due by banks for previous years had been paid to the State, and it was intended that thenceforth the taxes as to banks should be assessed under the provisions of this act, so that no loss would result to the State treasury from the decision of this court in the Marion County cases. With this purpose in view, sections 5 and 6 were included in this subdivision:

"Sec. 5. All laws or parts of laws in conflict or inconsistent with this act, providing for other methods of taxation of shares of national banks or the taxation of trust companies and state banks, incorporated under the laws of this Commonwealth, and the collection of taxes thereon, are hereby repealed.

"Sec. 6. All national banks, trust companies and state banks shall file with the auditor their reports herein provided for on or before the 15th day of April, 1906, and annually thereafter on or before March the first. Said reports shall be made up to and including the first day of the preceding September."

If it had not been intended that the taxes for 1906 were to be assessed under the act, there was no need for a special repealing clause in this subdivision; and the sixth clause must otherwise be rejected as meaningless. It is true the act did not take effect until June 11th, but the Legislature plainly intended that the assessment should be made under it, and it was done. Even if an assessment for 1906 had been made before the Legislature met, it could have

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directed another assessment to be made and the taxes to be paid under it. And so, if the board had made an assessment under the act of 1904, it would have been its duty after June 11, 1906, to have made an assessment under the act of 1906, and the taxes should have been paid under that assessment. The fiscal year for 1906 did not expire until June 30, 1906 (Const., section 169), and clearly the board had the power at any time within the fiscal year to make an assessment for that year. Aside from this, it would scarcely be contended that the failure of an assessing officer to make an assessment within the time allowed by law would prevent him from making it within a reasonable time thereafter or render invalid the assessment so made, unless it could be shown that the meritorious rights of the property owner were prejudiced by the delay. Anderson v. City of Mayfield, 93 Ky. 230, 14 Ky. Law Rep. 370, 19 S. W. 598. If an assessing board by failing to perform a manifest duty should prejudice the meritorious rights of the property owner, no doubt he could obtain proper relief; but, in this case, the fact remains that the board of valuation and assessment in delaying this assessment did not prejudice the meritorious rights of the shareholders of appellee. The law under which the assessment was made was in every substantial particular identical with the preceding law of 1904. If the assessments had been made under it, the shares of appellee would have been assessed at precisely the same sum at which they were assessed. The argument that if its shares had been assessed under the act of 1904, and the capital of state banks and trust companies under the act of 1902, it would have had the right to deduct the value of the United States bonds owned, and hence

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was prejudiced by the failure to assess under these laws, does not impress us either favorably or forcibly. Why should it have been entitled to this exemption? Certainly not on account of anything in the act of 1904, but because of a discrimination in the act of 1902, under which state banks were assessed, and, when this was removed, the technical right of national banks to exemption ceased to exist, and it was removed when the act discriminating in favor of state banks was repealed, and their shares were assessed under an act applying equally and alike to all banks. As the act under which the national bank shares were assessed did not permit any discrimination against them, either in law or fact, or impose any rate of taxation greater than was assessed upon other moneyed capital, or state banks or trust companies, they will not be heard to say that they were prejudiced by the delay of the assessing board. Nor are we in the disposition of the matter before us concerned with the manner in which local assessments were made for purposes of counties, cities, towns, and taxing districts, or when they were made, or when the taxes were paid thereunder. The state board of valuation and assessment under the act of 1906 had no power to make assessments for counties, cities, towns, or taxing districts, but was limited solely to assessing property for taxation for state purposes; the assessment and taxation of trust companies and banks, both state and national, for local purposes being left to the local authorities. The petition does not assail any assessment, except the one made for state purposes.

The federal courts have jurisdiction of questions involving the taxation of national banks, and in all cases decided by the Supreme Court of the United

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States that we have examined it will be found that the court has uniformly held (a) that the tax must be upon the shares, and not upon the capital or property of the banks; (b) that no greater rate of taxation shall be placed upon national banks than is imposed upon other moneyed capital—the fundamental idea being to prevent discrimination against national banks. In so ruling the court has only endeavored to give full and fair meaning to the provisions of the national banking act that the taxing shall be upon the shares, and not be at a greater rate than is assessed upon other moneyed capital. It was not the intention of the national banking act, nor has it been the purpose of the Supreme Court, as we understand its opinions, to allow national banks any advantage over other moneyed capital or to permit any discrimination in their favor as against other banking institutions. Keeping in mind this proposition, and the undisputed fact that the shares of state banks and trust companies and national banks have been taxed under the same law and precisely alike, there is no merit in the contention of the appellee banks. Their efforts to escape a just and fair share of taxation by attempting to so construe the law and the acts of the board of valuation and assessment as to make it appear that they or their shareholders were or might have been discriminated against, when, in fact, they were not and could not have been, will not be sanctioned.

Wherefore the judgment of the lower court is reversed, with directions to dismiss the petition in each case.

CHIEF JUSTICE O'REAR and JUDGES BARKER and LASSING, dissent.

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CASE 24.—ACTION BY WILLIAM DUDLEY AGAINST THE ILLINOIS CENTRAL R. R. CO. AND ANOTHER FOR DAMAGES FOR PERSONAL INJURIES.—October 16, 1906.

Dudley v. Illinois Cent. Ry. Co., &c.

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Appeal from Caldwell Circuit Court.

J. F. GORDON, Circuit Judge.

From an order dismissing the suit as to defendant Calvin Mitchell and sustaining the motion to remove the cause to the federal court, plaintiff appeals—Affirmed.

1. Removal of Causes—Citizenship—Joinder of Parties—Petition.—Plaintiff, who was a brakeman on one of defendant railroad company's freight trains, sought to recover damages for injuries sustained by his being struck by a waterspout alleged to be too near the track. Plaintiff joined defendant M., whose citizenship was the same as plaintiff's, with defendant railroad company, whose citizenship was diverse, and alleged that M. had charge of defendant's waterspout, etc., and that the railroad company and M., as its agent and servant, had carelessly, etc., placed the post and pillars supporting the spout so near the track as to make its position dangerous, and that the spout was negligently permitted to hang in dangerous proximity to the top of the train, that by the negligence of defendant company and M. in placing the pillar, and in permitting the spout and connections to be in such condition, plaintiff was struck by the spout and injured. Held, That the petition stated a cause of action against both defendants, and that the court therefore properly denied the motion of the railroad company in the first instance to transfer the cause to the federal court.
2. Master and Servant—Injuries to Servant—Fellow Servant's Liability.—A servant of a railroad company in charge of its

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water tanks, spout, pumping stations, and appliances under the direction of a superintendent, was not liable for injuries to a brakeman by striking a spout negligently placed too near the track, where such servant had nothing to do with the placing or adjusting of the pipe and fixtures, and was guilty at most of mere nonfeasance for failure to remedy the defect.

3. Removal of Causes—Renewal of Motion.—Where, in an action, for injuries to a servant, plaintiff joined a resident employe as a party defendant with the railroad company, which was a non-resident, and at the close of plaintiff's evidence no cause of action had been established against the resident defendant, and there was nothing to warrant the presumption that a stronger case could have been made out when the petition was filed, it was proper for the court to grant the railroad company's renewed motion for a removal of the cause to the federal court, on the ground that the citizen defendant had been joined for the sole purpose of preventing such removal.

HENDRICK, MILLER & MARBLE for appellant.

JOHN C. GATES, TRABUE, DOOLAN & COX, J. M. DICKINSON and P. H. DARBY for appellees.

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Reversing.

The appellant, who was a brakeman on one of appellee's freight trains, brought this suit against the appellee company and Calvin Mitchell to recover damages resulting from injuries sustained by being struck by a waterspout attached to a tank operated by the defendant company near Cerulean Springs. The petition averred: "That the defendant Calvin Mitchell was in the employ of the company, and was acting as its pumper or superintendent or supervisor or manager of pumps, tanks, and all the appliances and water tanks, along its road; that he had charge and management of the pumps, tanks, cranes, chains,

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posts, and all appliances of the pumping stations which furnished water to the engines of the company, and was paid by the company to do this work under its orders; that he was especially and directly in charge and control of the tank and crane and spout and pumping station and all the appliances thereof at Cerulean Springs, and of the supplying of water to the engines, and was actually managing and controlling said tanks, pump, spout and appliances; that the company and Mitchell, as its agent and servant in charge of said tank, had carelessly, wrongfully and negligently placed the post, pillar and support supporting the spout and crane which was used in supplying the engine with water, dangerously and unnecessarily near to the track, making the position of same improper, defective and dangerous, because of its proximity to the track, and had negligently peritted the chains, spout and other appliances of the tank to be defective and out of repair, and to hang in dangerous proximity to the top of the train, so as to endanger the lives of the employes engaged in discharging their duties; that by the negligence of the defendant company and Mitchell in placing the post, pillar and support so near the track, and by their negligence in suffering and permitting the support and connections of the tank to be in such condition as to put the spout in dangerous proximity to the train, the plaintiff was struck by the spout upon the head and injured." The petition also contained other allegations necessary in cases of this character. In due time the railroad company, a foreign corporation, filed its petition and bond for removal of the cause to the United States Court. This motion the trial court overruled. Upon a trial of the case, at the conclusion of the evidence for plaintiff, now appellant,

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the defendant Mitchell entered a motion for a peremptory instruction, which was sustained by the court, and thereupon the jury returned a verdict for Mitchell. When the action against Mitchell was terminated in this way, the defendant company renewed its motion for removal, and it was sustained by the court. Appellant complains of the action of the trial court in giving the peremptory instruction and in removing the cause.

The petition stated a good cause of action against both the defendants, and the court properly refused to transfer the action when the motion was first made. I. C. R. R. v. Coley, 121 Ky. 385, 89 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370; Pierce's Adm'r v. I. C. R. R., 86 S. W. 703, 27 Ky. Law Rep. 801. Whether the transfer was proper, upon the conclusion of the evidence for appellant, depends upon the question whether or not Mitchell was joined as defendant in good faith. The mere fact that the trial judge sustained a peremptory instruction on behalf of Mitchell is entitled to some weight, but is not in itself conclusive evidence that Mitchell was not joined in good faith, or that appellant failed to make out a case against Mitchell. To determine therefore whether or not the action of the trial court was proper, we will examine the evidence introduced by appellant, and determine from it whether or not the averments of the petition stating a good cause of action against Mitchell were sustained. The substance of the allegations against Mitchell are that he was directly in charge and control of and actually managed and controlled the tank, crane, spout, pumping station, and all appliances connected therewith, and that as agent and servant of the company he carelessly and negligently placed the pillars, support-

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ing the spout and crane, dangerously and unnecessarily near the track, making the same improper, defective, and dangerous because of its proximity to the track; and that the company and Mitchell negligently permitted the chains, spout, and other appliances of the tank to be defective and out of repair, and to hang in dangerous proximity to the top of the cars. The evidence for plaintiff was to the effect that Mitchell was in charge of the tank and pump of the defendant on the Evansville & Hopkinsville Division, which included the tank at Cerulean Springs, and hired the pumpers, and that the tank at Cerulean Springs was some two feet nearer the track than the tank at Princeton on the same line; that Mitchell was working under one Noles, and had been seen repairing the tanks and machinery attached thereto; that the water pipe from the tank was the instrument that struck the appellant and knocked him off the train; that it was Mitchell's duty to examine the tanks and pumps at each station, and keep them in running order; and that the pipe that struck appellant was improperly adjusted and hanging too far over the track. There was no evidence whatever tending to show that Mitchell had anything to do with erecting the tank or placing or adjusting any of the fixtures or appliances thereon; nor does the evidence disclose whether the pipe that struck appellant was so constructed that it hung too far over the track, or was negligently permitted to hang in that condition by some person when using it; nor does the evidence show that Mitchell could have reconstructed the tank or placed it further from the track, or have supplied it with different pipes or appliances, or that he was furnished by the master with any other appliances than those in use, or that he

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had it in his power to do anything more than he had done. Mitchell was a subordinate employe of the railroad company, working under the superintendent or person who had charge of the tanks or pumping stations.

Assuming that it was the duty of Mitchell to keep these tanks and appliances in repair, and that the water pipe that struck appellant was hanging too low down, Mitchell could not be held liable to appellant, unless a servant such as Mitchell was is liable for nonfeasance, or for his failure to affirmatively take some action to remedy defects or dangerous appliances to which his attention may be directed. This precise question was before this court in Cincinnati, New Orleans & Texas Pacific R. Co. v. Robinson, 115 Ky. 858, 74 S. W. 1061, 25 Ky. Law Rep. 265, and it was there held that the petition having failed to show any cause of action against Robinson, the employe joined with the company, that it was proper to remove the case to the United States Circuit Court. In the case at bar, the evidence wholly fails to make out a case against Mitchell, and therefore the action of the trial judge in giving the peremptory instruction was proper. The petition for removal set out that Mitchell was joined as a defendant for the sole purpose, and with the fraudulent design, of preventing the transfer of the case to the United States Circuit Court, and that the allegations of the petition in respect to Mitchell were untrue, and could not be sustained by evidence; and, when the evidence on behalf of appellant disclosed a total failure to show any liability on the part of Mitchell, the conclusion remained that the allegations of the petition for removal were true.

In Illinois Central R. Co. v. Coley, 121 Ky. 385, 89

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S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370, the engineer in charge of the train that injured plaintiff was joined as a defendant. A petition similar to the one in the case at bar was filed for removal, and overruled. On a trial, a verdict was rendered against the defendants. In discussing the question of removal, this court said: "If the engineer negligently ran the engine against the wagon in which appellee was riding and injured her, he is liable to her for her injuries. The fact that he did not own the engine, or that he was operating it in the service of the railroad company, makes him none the less liable for his personal wrong. If, in operating the engine, he was acting as agent of the railroad company, and his act was its act, then it is also responsible to her upon the principle that he who does an act by another does it himself." In that case the evidence justified the finding that the engineer was guilty of an affirmative act of negligence, and, although a subordinate employe, was jointly liable with his principal for his negligent conduct. The court further said: "If the plaintiff trifled with the court, and joined a defendant who is a resident of the State simply for the purpose of defeating the right of the other defendant to remove the case to the federal court, the court should, as soon as this is made apparent on the trial, dismiss the action as to the defendant fraudulently joined, with costs, and remove the case to the federal court. The court should not at any stage of the proceeding allow a party to trifle with its process, or to defeat the courts by fraudulent joinder of a person as a defendant."

If the plaintiff can by stating in his petition a good cause of action against a resident defendant, and thereby prevent the nonresident defendant from

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transferring the case, although upon the trial the evidence wholly fails to show any cause of action against the resident defendant, the result would necessarily be that in every case where this was done a removal could be prevented, and the plaintiff, by the fraudulent or mistaken joinder of a person as a defendant, could defeat the jurisdiction of the federal court. Powers v. C. & O. Ry. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. It is true that it is for the state court to determine from the record, when the motion for a transfer is made, whether or not there is then presented a state of case authorizing a transfer. Illinois Central R. Co. v. Jones' Adm'r, 118 Ky. 158, 80 S. W. 484, 26 Ky. Law Rep. 31; Rutherford v. Illinois Central R. Co., 120 Ky. 15, 85 S. W. 199, 27 Ky. Law Rep. 397. And it has been ruled in a number of cases that the motive or purpose of the plaintiff in joining the defendants will not be inquired into, provided a cause of action is stated against them jointly. Winston's Adm'r v. Illinois Central R. Co., 111 Ky. 954, 23 Ky. Law Rep. 1283, 65 S. W. 13, 55 L. R. A. 603; C. & O. Ry. Co. v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; Rutherford v. Illinois Central R. Co., 120 Ky. 15, 85 S. W. 199, 27 Ky. Law Rep. 397. But when, during the progress of the trial—for instance, at the close of the plaintiff's evidence—it becomes apparent that no cause of action has been made out against the resident defendant, and there is nothing in the record to warrant the presumption or conclusion that a stronger case could have been made out when the petition was filed, the court will not sit idly by and permit a plaintiff, by making allegations that he must have known he could not establish, to deprive the defendant of a right guarantied to it or him by

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the law. However reluctant state courts may be to surrender their jurisdiction, they cannot lend themselves to a scheme to defeat rights to which each one of the parties litigant is entitled, or permit a skillful pleader to determine the question of removal without reference to the merits of the case.

The case of Whitcomb v. Smithson, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303, is not in conflict with these views. It is true that in that case, at the close of the testimony for plaintiff, the trial court sustained a peremptory instruction offered by the resident defendant, and thereupon the nonresident defendant again moved to transfer the case, and this motion was overruled. In sustaining this ruling, the Supreme Court said: "This was a ruling on the merits, and not a ruling on the jurisdiction. It was adverse to the plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby enable the other defendants to prevent plaintiff from taking a verdict against them. As we have said, the contention of that railway company that it was fraudulently joined as a defendant had been disposed of by the United States Circuit Court. But, assuming without deciding that that contention could not have been properly renewed under the circumstances, it is sufficient to say that the record before us does not sustain it." It will thus be seen that the decision of this question is rested upon the grounds: First, that it had been disposed of by the United States Circuit Court; and, second, that the record did not show a fraudulent joinder.

The judgment of the lower court is affirmed.

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CASE 25.—ACTION BY R. P. TOWNSEND'S ASSIGNEE AGAINST R. P. TOWNSEND AND OTHERS ON A POLICY OF LIFE INSURANCE.—November 19.

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Townsend's Assignee v. Townsend, &c.

Appeal from Logan Circuit Court.

GEO. S. HARDY, Special Judge.

From the judgment plaintiff appeals—Affirmed.

1. Insurance—Life Policy—Vested Interest of Beneficiaries.—The interest of the children of insured in a life policy payable to them, or if they die before him then to his legal representatives, with no reservation in the policy of the right to change the beneficiary, but merely a reservation to insured of the right to surrender the policy at the end of the first ten years, or at the end of any subsequent five years, and to receive in cash its then cash value, such right continuing for only 30 days immediately succeeding any such term of years, is a vested interest, subject to be defeated only if they die before insured, or if he, at the time and in the manner expressed in the policy, exercise his power to surrender it for its then cash value.
2. Same—Power to Surrender—Delegation of Power.—Insured in a life policy must exercise in person the power therein reserved to surrender the policy at the end of ten years, or at the end of any subsequent five years and receive its then surrender value, and can not delegate to another such power, as against the beneficiaries, notwithstanding the beneficiaries had nothing to do with bringing the contract of insurance into existence.
3. Assignments for Benefit of Creditors—Right to Life Insurance.—Even if the insured could delegate to another authority to exercise the power in a life policy to surrender the policy and receive its surrender value, the assignee for creditors of insured would have no right to the insurance as against the beneficiaries, because of insured having given a

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power of attorney to so surrender it; it not having been exercised.

4. Same.—The right of the assignee for creditors of insured in a life policy, as against his children, named as beneficiaries, is no greater, under Ky. Stats., 1903, section 655, providing that when a life policy is in favor of another than insured, having an insurable interest in his life, the beneficiary shall be entitled to its proceeds against the creditors of insured, because of the estate of insured being named as beneficiary in case his children did not survive him, and a power being reserved to him to surrender the policy and receive its surrender value; the children being alive, and he not having exercised the power.

Judges Hobson, Lassing and Barker dissenting.

S. R. CREWDSON, Attorney for appellant.

Our contention is that the cash surrender value of the policy in controversy should be paid to the appellant trustee to be applied to pay the debts of R. P. Townsend, subject to the lien of the First National Bank of Nashville, Tenn., for $2,600.

Under the provisions of the policy he had the right to the cash surrender value of the policy at the optional period which was payable to him, and it thereby gave him the right to elect how it should be applied, and by the power of attorney executed by him in 1889 to the bank it was the intention to pledge this fund to his creditors, and was an election on his part so to do. It was a fund due him, and him alone, under the terms of the policy.

HUMPHREY & HUMPHREY and L. R. YEAMAN for appellee Connecticut Mut. Life Ins. Co.

POINTS AND AUTHORITIES.

1. The Terms of the Policy.—The option given to Townsend, to surrender the policy and take the cash value, has not been exexcised. Until this option is exercised, the policy will be continued in force and will remain a claim against the insurance company, payable at Townsend's death to his children or, if his children are not then living, to his legal representatives.

2. Bank's Interest in the Policy.—The First National Bank of Nashville, Tennessee, is claiming a lien on the policy. The bank was for this reason a necessary party, and it was not before the

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court. The judgment dismissing the action was, therefore, proper. (Civil Code, section 371.)

3. D. B. Smith was made a party through mistake.

4. The Rights of Townsend's Children.—The children's rights in the policy will never attach unless they survive Townsend and Townsend does not exercise his option to cash the policy.

5. Rights of Townsend's Creditors.—There is no rule by which Townsend could be compelled, in the interest or for the benefit of his creditors, to exercise his option to surrender the policy and accept the cash value thereof. (Ky. Stats., section 655.)

PERKINS & TRIMBLE for appellees D. B. Smith and others.

POINTS AND AUTHORITIES.

1. Dr. Townsend's children had a vested inerest, even though subject to be defeated. (Hopkins v. Hopkins' Admr., 92 Ky., 324; Wirgman v. Miller, 98 Ky., 620; Mut. Life Ins. Co. of Ky. v. Twyman, 28 Ky. Law Rep., 1153.)

2. R. P. Townsend, the insured, had no title to the policy or vested right therein—but simply a naked option. (Stembridge v. Stembridge's Admr., 87 Ky., 91.)

3. The option was purely personal. (Mut. Life Ins. Co. v. Martin, 21 Ky. Law Rep., 1465; Ky. Stats., 1639; 9 Cyc., 620; 21 Am. & Eng. Ency. of Law (new), 934; Duer v. Duffy, 24 L. R. A., 341.)

4. R. P. Townsend had no vendible interest in this policy on the 24th day of June, 1903, when he executed and delivered his deed of general assignment. (Ky. Stats., section 75; Morehead's Admr. v. Mayfield, 109 Ky., 51; Barbour's Admr. v. Larue's Assignee, 21 Ky. Law Rep., 94; Planters' State Bank v. Willingham's Assignee, 111 Ky., 64, and 23 Ky. Law Rep., 445.)

5. To mature the policy in the year 1905, there must have been a strict compliance with the provisions of the contract in that respect. (21 Ency. of Law (2d Ed.), 930; John R. Davis Lumber Co. v. Hartford Life Ins. Co., 37 L. R. A., 131; Litz v. Goosling, 21 L. R. A., 129.)

6. Time is of the essence of the contract. (Stembridge v. Stembridge, 87 Ky., 91; Fry on Spec. Pref. of Contracts, p. 419 and 424; Note to 21 L. R. A., 129; Dyer v. Duffy, 24 L. R. A., 341; Hexter v. U. S. Life Insurance Co., 91 Ky., 357; N. W. Mut. Life Ins. Co. v. Barbour, 92 Ky., 429; Montgomery v. Phoenix Mut. Life Ins. Co., 14 Bush, 51; Mut. Life Ins. Co. v. Jarboe, 19 Ky. Law Rep., 1501; Washington Life Ins. Co. v. Miles, 23 Ky. Law Rep., 1705; Washington Life Ins. Co., v. Lyne, 26 Ky. Law Rep., 1070; 21 Ency. of Law (new), p. 931; 9 Cyc., pp. 603, 604 and 605.)

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7. There must have been a surrender of the policy to the insurer at its home office within 30 days from February 4, 1905—this is a condition precedent. 1 May on Insurance, p. 128; Crown Point Iron Co. v. Aetna Ins. Co., 14 L. R. A., 147; Southern Mutual Life Ins. Co. v. Hancock, 6 Ky. Law Rep., 446.)

8. Was there at any time an election to exercise the option, and was the option ever exercised?

(I.) R. P. Townsend did not exercise the option.

II.) The First National Bank of Nashville, Tennessee, did not exercise the option. (9 Cyc., p. 617.)

(III.) The assignee for creditors (appellant) at no time exercised the option.

9. To surrender said policy within the thirty days, the release and discharge thereof by R. P. Townsend must hae been "to the satisfaction of the company." (9 Cyc., pp. 618 and 620.)

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

R. P. Townsend on February 4, 1885, took out a policy of insurance upon his life for $10,000. It was a 10-payment life policy, by which, in consideration of the annual payment in advance by the insured, R. P. Townsend, of $619.20 to the insurer, the Connecticut Mutual Life Insurance Company of Hartford, Conn., the latter undertook to pay to the beneficiaries named in the policy, upon the death of the insured, the sum of $10,000. The agreement was to pay the sum insured "to Emma S. Townsend (the assured), wife of the said insured, for her sole use and benefit, or to her legal representatives, thirty days after due notice and satisfactory evidence of the death of the insured while this contract is in full force and effect; * * * if the said assured die before said insured, the said sum insured above shall be paid to his children, or to the then guardian if under age; or, if there be no such children or descendants of such children then living, the said sum insured

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shall be payable to the legal representatives of said insured." There was also this provision in the policy contract: "And at the end of ten years from the date thereof, or at the end of each period of five years thereafter, this policy having been in force during such entire periods for the full sum first above named as insured hereby and not otherwise, this company will pay a cash value therefor, to be ascertained by the table of cash values endorsed hereon and hereby made a part of this contract; such cash value to be payable at its said office upon surrender hereof within thirty days after the end of each such period, to, and this policy to be first released and discharged to the satisfaction of said company by Robert P. Townsend. And it is hereby agreed by all the parties hereto that such surrender, release and discharge shall terminate this policy, and any and every obligation whatsoever of said company thereunder, to any and every person whatsoever." There was also this condition in the policy: "(6) That no assignment of this policy shall be valid, but the company shall have the power at any time, but at its own discretion, to accept a surrender and discharge of the same by the assured and the person nominated therein as payee of the cash value at stipulated periods."

Some time after the insurance was affected, the assured, Emma S. Townsend, died, leaving one child, who is not living, a daughter of R. P. Townsend. Subsequently R. P. Townsend married again, and by the second marriage had issue, one daughter, living. His second wife is yet alive. The insured paid all of the premiums due upon the policy, and it is now fully paid up. On June 5, 1899, the insured, being indebted to the First National Bank of Nashville,

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Tenn., in about $2,600, executed to it the following paper, evidently to secure the indebtedness: "Whereas, I, the undersigned, Robert P. Townsend, of Adairville, Kentucky, hold a policy of $10,000 in the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, No. 173,188, issued February 4, 1885, which is now a paid-up policy, and which policy I have this day delivered to the First National Bank of Nashville, Tennessee. And whereas, said policy contains the following provision, to-wit: 'And at the end of ten years from the date hereof, or at the end of each period of five years thereafter, this policy having been in force during such entire periods for the full sum first above named as insured hereby and not otherwise, this company will pay a cash value thereof, to be ascertained by the table of cash values endorsed hereon and hereby made a part of this contract; such cash value to be payable at its said office upon surrender hereof within thirty days after the end of such period, to, and this policy to be first released and discharged to the satisfaction of said company by Robert P. Townsend, the insured. And whereas, I desire that the First National Bank of Nashville, Tennessee, be appointed and constituted my attorney in fact to collect the cash value of said policy, as provided for in the above quoted clause: Now, therefore, I, Robert P. Townsend, aforesaid, do nominate and appoint the First National Bank of Nashville, Tennessee, my attorney in fact to demand and receive of and from said Connecticut Mutual Life Insurance Company of Hartford, Connecticut, any and all amounts which may be due me on said policy. Said bank is authorized to execute all receipts and other acquittances in my name to said insurance company, and in case of its failure to pay, said bank

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will bring suit against it and prosecute same in my name. Said bank is also authorized to employ counsel or agents at my expense and to do all things which may be necessary in and about the collection of said policy. However, said bank has authority to permit said policy to remain in force until my death or to collect the cash value thereof at any one of the periods provided for in said policy; it being my intention to leave this question to the discretion of said bank. I do hereby ratify and confirm all the lawful acts and doings of said bank in pursuance of the power and authority hereby communicated, as fully as if I were to do them myself. This June 5th, 1899. (Signed) R. P. Townsend."

On June 24, 1903, the insured, having become largely indebted, executed a deed of general assignment for the benefit of his creditors. Appellant is the assignee.

On January 2, 1905, appellant filed an amended petition in the action which he had brought to settle the assigned estate, seeking to have the cash surrender value of the insurance policy paid over to him for the benefit of all the creditors of the insured, upon the theory that the insured's interest in the policy had passed to his assignee under the deed. It was alleged that the policy at that time had a cash surrender value of $6,240; that the insured had the right under its terms to surrender it and receive that sum from the insurer; that his right was a right of property, which passed under the deed of assignment; and that appellant as assignee could exercise the option or privilege given by the policy, which he attempted in this manner to do. The insurance company, the Nashville Bank, the insured, and his two children were made defendants to this ancillary

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action. Waiving certain matters of practice, we will take up the main question presented, which is: Did the policy of insurance, or R. P. Townsend's interest in it, pass under the deed of assignment for the benefit of creditors; and could the assignee exercise the privilege given by the policy to the insured, of surrendering it in accordance with its terms, and take its then cash surrender value in discharge of all the company's liability on it?

The estate of the assignor embraced by the general deed of assignment is regulated by section 75, Ky. St. 1903, which reads in part: "The deed of assignment shall be acknowledged by the assignor in the same manner as other deeds, and shall be recorded in the county clerk's office of the county where the assignor resides, and where the business in respect of which the same is made is carried on, and in each county where a tract of land or the greater part thereof conveyed by the deed is situated; and the deed shall vest in the assignee the title to all the estate, real and personal, with all deeds, books and papers relating thereto belonging to the assignor at the time of the making of the assignment, except the property exempt by law shall not pass unless embraced in the deed." We think it is first necessary to determine the rights of the parties to the contract of insurance, who are (1) the insurer, (2) the insured (R. P. Townsend), and (3) the assured, the beneficiaries named or described in the policy. At the time of the suit, and of the judgment, the latter were the children of R. P. Townsend. But, should other children be born to him, or should any of his children die in his lifetime leaving children, the clause in the policy naming its beneficiaries would open up to let them in. In Hopkins v. Hopkins' Adm'r, 92 Ky. 324,

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13 Ky. Law Rep. 707, 17 S. W. 864, the law is thus stated as to the rights of beneficiaries named in life insurance policies: "The general rule is that the right to a policy of insurance, and the money to become due under it, vests immediately upon its issual in the person named in it as the beneficiary; and that this interest, being vested, cannot be transferred by the insured to any other person. Washington Central Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370. The vested right cannot be divested without the consent of the person invested with it. This is so as to insurance in both mutual and ordinary life insurance companies. This does not hold true, however, where the contract of insurance provides that the insured may change the beneficiary. In such case it vests conditionally only."

In the case at bar, there was no reservation in the policy of the right to change the beneficiary. The only reservation to the insured was the right to surrender the policy at the end of the first 10 years, or at the end of any subsequent 5 years, and to receive in cash its then cash surrender value. And this right continued only for 30 days immediately following the 10 and 5 year terms mentioned. Unless, then, this right was exercised at the time, and in the manner expressed in the policy, the interest of the named beneficiaries continued unaffected by it. Their interest was vested, subject to be defeated only (1) if they died before the insured, or (2) if he, at the time and in the manner expressed in the policy, exercised his option to surrender it in exchange for its then cash surrender value. It was not within the power of the insured, or within his and the insurer's power, to alter the terms of the contract so as to affect the interests of the beneficiaries. The insured had not

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the right to assign the policy to another, for value or not, nor had he the right to pledge it as collateral to secure his own indebtedness. The assignee could take no better title than he himself had, which was that of ultimate beneficiary in event of his failure of issue during this life. In the latter event it is quite likely his assignment to a creditor would be held to create an equitable lien upon the fund. But it is contended that the insured has exercised his option to surrender the policy in exchange for its cash surrender value. It must be remembered, in testing this act, that it must be done not only when, but done in the way, the policy required. This is not so much for the benefit of the insurer who might waive the question, but for the assured, the beneficiaries. The power of attorney given to the bank was not an exercise by the assured of this option. It was an attempt on his part to give another the power to exercise an option which he alone had under the contract. Admitting that one may transfer his option so as to vest it in his assignee, it must at least be confined to his option concerning that which is his alone. If he has, by a tripartite contract, the option to adopt such a course in his judgment as would end the estate of one of the parties, the latter is entitled to have him exercise his own option. A. might be willing that B. should have the power to terminate the former's estate; whereas, he would be altogether unwilling to risk it with C., although selected by B. for the purpose. That the beneficiaries in this policy did not exercise their own will in bringing the contract into existence takes nothing from the applicability of the principle that one vested with a power, to be exercised on behalf of or against another party to the instrument creating it, must

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exercise it in person, and may not delegate it to another. Sugden on Powers, 214-224.

In addition, the attempted exercise of the power by the insured was not done in the manner nor at the times specified in the contract. He must have surrendered up this policy to the insurer within 30 days after the termination of the 10 and 5 year periods, respectively, to wit, within 30 days after February 4, 1895, February 4, 1900, February 4, 1905. As it affected the interests of others than the insured and insurer, time was of the essence of this contract.

Furthermore, the bank, though we should hold it had the same right to exercise the power to disappoint the beneficiaries that the insured had, has never exercised that power. In whatever view the subject is looked at, the case always comes back to this point: The right reserved to the insured to surrender the policy at stated intervals in exchange for its cash surrender value has not been exercised, and therefore the vested interest of the beneficiaries remains unaffected by it.

From what has been said it follows that, if the insured could not assign the policy, in spite of its declaration that it was not assignable, and in spite of the vested interests of its beneficiaries, so as to secure a particular debt of his own, he could not assign it for the benefit of his creditors generally so as to vest his assignee with all the rights and power under it that the insured himself had.

Certain cases in this court have involved the rights of the creditors of the insured in policies of life insurance, where there was an assignment for the benefit of creditors. Planters' State Bank v. Willingham's Assignee, 111 Ky. 64, 23 Ky. Law Rep. 445, 63 S. W. 12; Larue's Assignee v. Larue's Adm'r, 96

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Ky. 326, 28 S. W. 790, 16 Ky. Law Rep. 641; Barbour's Adm'r v. Larue's Assignee, 106 Ky. 547, 51 S. W. 5, 21 Ky. Law Rep. 94; Morehead Case, 109 Ky. 51, 58 S. W. 473, 22 Ky. Law Rep. 580. It is thought that these cases indicate that a policy of insurance on one's life, in which his estate is the beneficiary, is such property as passes under a general deed of assignment. If the insured's estate is the only beneficiary, and if the policy has been in existence long enough to have a cash value, it is such estate. But that is not this case. Life insurance was primarily for the benefit of the dependent members of the family of the insured. While not exclusively so, nor necessarily so, such is generally its purpose. A man can labor while he lives to feed and clothe those who are dependent on him. It is a natural and commendable desire to provide for the same objects after his death. Such providence is looked upon encouragingly by the law. It is viewed in the same light that homestead and other exemptions are, all of which evidences the humaneness of the law. It recognizes that a man may owe other obligations in this life just as sacred, even in the eyes of the law, as those to his coal dealer or butcher. It admits the obligation to provide, first, at least a reasonable and decent subsistence for our dependent members; that little children have moral and legal rights upon the parents as much entitled to the law's respect and consideration, as creditors have. Therefore, the Legislature of this State has enacted:

"Sec. 654. A policy of insurance on the life of any person expressed to be for the benefit of, or duly assigned, transferred, or made payable to any married woman, or to any person in trust for her, or for her benefit, by whomsoever such transfer may

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be made, shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or any other person effecting or transferring the same or his creditors. And a married woman may, without consent of her husband, contract, pay for, take out and hold a policy of insurance upon the life or health of her husband or children, or against loss by his or her disablement by accident, and the premiums paid on such policy shall be held to have been her separate estate, and such policy shall likewise inure to her separate use and benefit and that of her children, free from any claim of her husband or others. But if the premium on any policy in this section mentioned is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of said creditors, subject, however, to the statute of limitations." Ky. St. 1903.

"Sec. 655. When a policy of insurance is effected by any person on his own life, or on another life in favor of some person other than himself, having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, shall be entitled to its proceeds against the creditors and representatives of the person effecting the same: Provided, that, subject to the statute of limitations, the amount of any premiums for said insurance paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless, before such payment, the company shall have written notice by, or in behalf of, some creditor, with

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specification of the amount claimed, claiming to recover for certain premiums paid in fraud of creditors."

There is no claim in this case that the insured diverted an unreasonable amount of his estate to life insurance for the benefit of his family. At that time he was a very rich man. His creditors then had no right to complain. The policy was fully paid up years ago, and while he was still in affluent circumstances. There is no hint that he acted in any fraudulent sense in the matter. It was therefore allowable, without prejudicing his creditor's rights, that he take out the policy for the benefit of his family as he did. It was to insure them against mishap in fortune as well as against his own premature death. Such insurance is made exempt, by the statutes quoted, from the debts of the insured. That it was competent for the Legislature to have done so is not open to question. That such insurance, honestly effected, is not liable for the debts of the insured, has been held in Hise v. Hartford Ins. Co., 90 Ky. 101, 11 Ky. Law Rep. 924, 13 S. W. 367, 29 Am. St. Rep. 358; Thompson v. Cundiff, 11 Bush, 567; Stokes v. Coffey, 8 Bush, 583; Hopkins v. Hopkins, supra; Wirgman v. Miller, 98 Ky. 620, 33 S. W. 937, 17 Ky. Law Rep. 1174; Morehead's Adm'r v. Mayfield, 109 Ky. 51, 58 S. W. 473, 22 Ky. Law Rep. 580. Those cases, we concede, dealt with the question of the right of one indebted to insure his life for some members of his family, and to pay for it out of his means; while here the debtor insures his own life for the benefit of members of his family, but in case they die before he does, then for the benefit of his estate in that contingency, reserving to himself also the right to anticipate the

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sum insured and apply it to his own use if he so chose.

Holding that the option to cash the policy has not been exercised, and that the power is not assignable, it is nevertheless such estate as that under a general deed of assignment will not pass by law to the assignee for creditors. His interest is remotely contingent, and incapable of being valued. It is so woven in with other considerations, such as his conception of duty to his children, and the exercise of judgment in their behalf and in his own, that there can be no certain way of estimating the value of that interest, or of disposing of it without destroying or endangering other interests under the policy which are primary to those of the insured. The option is, baldly, to let his children have this provision for their future support, or to take it himself. Whether he should take it himself involves the exercise of judgment, discretion, and his own conception of duty. No one else has the right to exercise it for him, nor against the children; no one else could be actuated by the same impulse. Suppose the case were that the insured merely had reserved the power to change the beneficiary. We have time and again held, since the Hopkins Case, supra, that such a power reserved in the policy was not affected by the statutes quoted above. Could he be required to exercise it against his children, and in favor of his creditors? Or could he have been required to so exercise it as to give it all to one child who was indebted, so that the creditors might get it, and so as to exclude the other child? Is this case different in principle from those supposed? We think not. If a debtor has a homestead exemption, or the two horses exempt from execution, could he be compelled to sell and convert

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the property into cash (for he has the right and power to do so) so that his creditors could reach it? A married woman may make a will. She may exclude her husband from her estate. But it is subject to his rights of renunciation within one year, in which event he would take under the statute of descent. It has been held by this court that an indebted husband could not be compelled to exercise his option to renounce the will which gave all the property to his children, and to take his part under the statute. Bottom v. Fultz, 124 Ky. 302, 98 S. W. 1037, 30 Ky. Law Rep. 479. We are unable to distinguish between the principle in that case and this one.

A statute of the United States (Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) provides that life policies of bankrupts shall be subject to administration by the trustee for the benefit of creditors. But this proceeding is not under that statute. Nor can it elucidate the principle under consideration to note the decisions of the federal court expounding that statute, although it might be noted, in passing, that Congress seems to have deemed it necessary to expressly include such policies, or they probably would not have passed under the bankrupt proceedings.

We conclude that the life policy in this suit was not assignable so as to affect the interests of the beneficiaries provided in it, that it did not pass to the assignee under the deed of assignment for creditors, and that therefore the assignee had no right of action upon it or to recover it.

Such was the judgment of the circuit court.

It is affirmed.

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(Hobson, J., dissenting.)

In the application for the policy, which was made a part of it, there was this: "To whom is this insurance payable in case of loss? Emma S. Townsend. Relationship to the insured? Wife. To whom is it payable in case the endowment insurance, if the person insured survives the term, and to whom if the policy be surrendered for a cash value as herein provided? To myself." The fundamental error in the opinion, it seems to me, is that it fails to recognize that an option to collect $6,240 is a right to that much money, and therefore property. Few insurance policies require the insured to accept the cash surrender value, and, if the right to accept the cash surrender yalue is not property, then in practically no cases would the insurance policy pass to the assignee for the benefit of creditors, and the rule so often announced by this court that insurance policies having a cash surrender value pass to the assignee under a deed of assignment amounts to nothing. Larue's Assignee v. Larue's Adm'r, 96 Ky. 326, 16 Ky. Law Rep. 641, 28 S. W. 790; Barbour's Adm'r v. Larue's Assignee, 106 Ky. 547, 51 S. W. 5, 21 Ky. Law Rep. 94; Planters' Bank v. Willingham's Assignee, 111 Ky. 64, 23 Ky. Law Rep. 345, 63 S. W. 12; Morehead's Adm'r v. Mayfield, 109 Ky. 51, 58 S. W. 473, 22 Ky. Law Rep. 580. The effect of the ruling is that, although Townsend had assigned all his property for the benefit of his creditors, he still had $6,240 beyond the reach of his creditors, which he could collect at the end of the tontine period and put in his pocket to commence business on again. The fact that the money was not due at the date of

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the assignment no more exempts it from the claims of the assignee than the fact that a note or other obligation was not due would exempt it. Our statute provides that all the property of the assignor shall vest in the assignee. It does not except anything except the exempt property. Ky. St. 1903, section 75. There is no exception in the statute of the property held by the assignor in insurance policies. The deed of assignment in this case transferred to the assignee all of the assignor's property, real and personal, "also all notes, stocks, bonds, choses in action, and all other property of every kind and description." When the court refuses to adjudge the money in controversy to the assignee, it goes without saying that the assignor may collect his $6,240 when he gets ready, and if such a right is not included by the words "choses in action and all other property of any kind and description," it is difficult to understand what these words would include.

In disposing of the authorities under the United States bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), the court says:

"A statute of the United States (the bankruptcy act) provides that life policies of bankrupts shall be subject to administration by the trustee for the benefit of creditors. But this proceeding is not under that statute. Nor can it elucidate the principle under consideration to note the decisions of the federal court expounding that statute, although it might be noted, in passing, that Congress seems to have deemed it necessary to expressly include such policies, or they probably would not have passed under the bankrupt proceedings." It is hard to understand how the court could say this in view of the authorities

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which were before it. The bankruptcy statute is just like our statute, in that it vests in the trustee in bankruptcy all the property of the bankrupt. There then follows certain exceptions of things which do not pass, and to one of these exceptions is attached this proviso: "Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets." Construing this proviso in Holden v. Stratton, 198 U. S. 213, 25 Sup. Ct. 659, 49 L. Ed. 1018, the court said: "As section 70a deals only with property which, not being exempt, passes to the trustee, the mission of the proviso, was in the interest of the perpetuation of policies of life insurance to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a nonexempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate." In other words, the purpose of the proviso was just the

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opposite to that indicated by this court. It does not enlarge the rights of the trustee. It simply gives the bankrupt a right he would not otherwise have. Under it, the bankrupt estate gets what it would collect from the insurance company, and the insured at the same time preserves his insurance if he wishes to do so. Not only so, but under the old bankruptcy law, which did not contain this proviso, where a policy had a cash surrender value, it was held to pass to the trustee. Holden v. Stratton, 198 U. S. 214, 25 Sup. Ct. 656, 49 L. Ed. 1018; In re Newland, 6 Ben. 342, Fed. Cas. No. 10,170; In re McKinney (D. C.) 15 Fed. 535. The United States courts also hold, under the present act, that policies pass to the trustee which have a real value, although they have no cash surrender value and are not within the provisions of section 70a. In re Slingluff (D. C.) 106 Fed. 154; In re Mertens (D. C.) 131 Fed. 972; Gould v. N. Y. Life Ins. Co. (D. C.) 132 Fed. 927; In re Coleman, 136 Fed. 818, 69 C. C. A. 496; Van Kirk v. Vermont Slate Co. (D. C.) 140 Fed. 38. These courts further hold uniformly that an option to accept a cash surrender value is property and passes to the trustee in bankruptcy. In re Diack (D. C.) 100 Fed. 770; In re Boardman (D. C.) 103 Fed. 783; In re Holden, 113 Fed. 141, 51 C. C. A. 97; In re Mertens, 142 Fed. 445, 73 C. C. A. 561; Clark v. Equitable Life Assurance Society (C. C.) 143 Fed. 175; Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771. That this policy would pass to the trustee in bankruptcy under the rulings of the United States courts must be admitted. The ruling of this court can have only the effect to compel creditors to preserve their rights in bankruptcy courts, and what good will come from this is hard to see. The rules for the adminis-

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tration of an insolvent estate should be the same in both courts, so that confusion may be avoided.

The court quotes at length sections 654 and 655, Ky. St. 1903. These sections, so far as they pertain to this case, are copied from the act of 1870. The facts as to that act are these: In Stokes v. Coffey, 8 Bush, 533, this court held that if an insolvent debtor insured his life for the benefit of his wife, so as to make an unreasonable provision for her, it was fraudulent as to antecedent creditors. To protect insurance of this character for the benefit of the wife, the Legislature passed the act referred to. Thompson v. Cundiff, 11 Bush, 567. The act applies to insurance for the benefit of the wife and children. It does not apply to insurance which the husband takes out for his own benefit. If the policy in question had not contained the provision that, in case the insured survived the term, the cash surrender value should be paid to him, the act would apply; but, so far as it is a contract to pay money to him, it is not within the language or the purpose of the statute. It has been supposed that our laws are so framed that human ingenuity could devise no plan by which a man might hold property free from the claims of his creditors. The statute was not intended to contravene this principle, and there is nothing in the subsequent decisions justifying such a construction. The interest of the children in the policy in contest is not absolute. It is not an insurance for their benefit, for the insured may yet exercise his right to accept the cash surrender value when he needs the money.

The case of Bottom v. Fultz, 124 Ky. 302, 98 S. W. 1037, 30 Ky. Law Rep. 479, has no application. The right of the husband to renounce the wife's will is a purely personal privilege conferred on him by the

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statute to protect him from injustice by the will of the wife. It is not property which the creditors can subject to their debts. To so hold would be to defeat the purpose of the statute. This doctrine is not applicable to rights created by contract which are property. When the husband does not within the year allowed him renounce the will of the wife, the rights of the devises become absolute. Here the insured may in future, when he wishes to, turn in the policy and accept the cash surrender value. The rights of the children under the policy are not absolute as long as he lives.

Every chose in action is assignable. Anything that is assignable may be pledged for debt. The tontine feature of the policy did not change its legal character. This was simply for the convenience of the insurance company. The clause in the policy forbidding its assignment was also solely for the company's protection. If it was not affected, no one else could complain. The bank had a lien on the policy for its debt, and the right to surrender it pursuant to the policy and accept the cash surrender value. If it did not do so, Townsend could do so and receive himself the surplus over and above the bank debt. This right which he had to receive about $4,000 passed by his assignment for the benefit of his creditors. The policy had been fully paid up for years before the assignment was made. The fund was simply so much laid up by the insured for a rainy day. When he needed the money, he could surrender the policy and collect the cash surrender value. It is a novel idea that a man may have insurance which he may collect and use if he remains solvent, but that if he becomes insolvent his creditors cannot reach it. On the contrary, as settled by this court in

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a long line of decisions, the law is that a man cannot have property which is beyond the reach of his creditors, and that he cannot, by providing in the deed or settlement that his rights shall not be assignable, tie the hands of creditors. There is no reason that money payable by an insurance company should stand differently from money payable under other engagements or settlements.

For these reasons, I dissent from the opinion of the court.

LASSING and BARKER, JJ., concur in this dissent.

CASE 26.—PROCEEDINGS BY THE BOARD OF SUPERVISORS OF WOLFE COUNTY IN FIXING A VALUATION UPON PROPERTY FOR TAXATION IN SAID COUNTY IN WHICH T. M. BECKETT AND OTHERS APPEAL.—April 19.

Wolfe County, &c., v. Beckett, &c.

Appeal from Wolfe Circuit Court.

ROBERT RIDDELL, Circuit Judge.

From the judgment the County and the Commonwealth appeal—Reversed.

1. Taxation—Property Subject to.—Subject to constitutional limitation, everything to which the legislative power extends may be taxed, whether person or property, tangible or intangible, franchise, privilege, occupation, or right.
2. Same—Oil and Gas Wells.—Under Ky. Stats., 1903, section 4020, making taxable all property not exempted by the Constitution, and under section 4039, re-enacted in Acts 1906, p.

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93, ch. 22, section 20, requiring all persons owning any mineral rights on the land of another, or any oil or gas privileges by lease or otherwise, etc., to list them for taxation, oil and gas wells held under a lease vesting ownership of the oil and gas in the lessee and continuing so long as oil or gas may be found in paying quantities are taxable.

3. Same—Listing Property—Statute Construed.—Ky. Stats., 1903, section 4039, requiring all persons owning any property, mineral rights, or branded trees on the lands of another, or any coal, oil, or gas privileges, in the State, other than in the county in which they reside, or if they reside out of the State, to list the property for taxation personally or by agent in the county where situated as is required of resident owners, etc., applies to both residents and non-residents.

4. Same—Oil and Gas Wells—Apportionment.—In taxing oil and gas privileges held under lease, there should be deducted from the value thereof the part represented by the amount of oil reserved to the lessor by the lease; the remainder being taxable against the lessees.

G. B. STAMPER and S. G. SAMPLE for appellants.

AUTHORITIES CITED.

Ky. Stats., sections 4120, 4020 and 4039; Acts of 1906, p. 89, section 4; Wilgus v. Comth., 9 Bush (72 Ky.), 556; Harvey Coal & Coke Co. v. Dillon, Tax Commissioner, 53 S. E. Rep., 928.

FULKS & HOVERMALE and GOURLEY, REDWINE & GOURLEY for appellees.

AUTHOITIES CITED.

Kincaid v. McGowan, 88 Ky., 91; Stewart, Trustee, v. Comth., 94 Ky., 595; Fox v. Long, 8 Bush, 551; Arnold v. Smith, 3 Bush, 163; Creutz v. Heil, etc., 89 Ky., 429; Carter v. Tyler County, 43 L. R. A., 725; Wilson v. Youst, 39 L. R. A., 292; Williamson v. Jones, 25 L. R. A., 222; Ky. Stats., sections 4024, 4039 and 4058; Comth. v. Hollidy, 98 Ky., 616; Comth. v. Tencray, 21 Ky. Law Rep., 572; Comth. v. Engle, 21 Ky. Law Rep., 101.

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OPINION OF THE COURT BY WILLIAM ROGERS CLAY, Commissioner—Reversing.

Appellee T. M. Beckett listed for taxation in Wolfe county for the year 1907, along with other property, certain property of the value of $1,000 under the items, "Steam engines and boilers." This the board of supervisors for the county raised to $3,000. Under the items, "Coal mines, oil, gas and salt wells," he listed property of the value of $14,000. This the board of supervisors raised to $55,825. Appellee Milton Garver listed for taxation in the same county for the year 1907 under the items, "Coal mines, oil, gas and salt wells," property of the value of $2,500. This valuation the board of supervisors raised to $5,000. Appellee Morehead Oil & Gas Company had listed to it by the board of supervisors for the year 1907, under the items, "Coal mines, oil, gas and salt wells," property of the value of $15,000. From the final action of the board of supervisors, appellees herein appealed to the Wolfe county court. That court sustained the action of the board of supervisors. Appellees then appealed to the Wolfe circuit court. There they filed a petition alleging that they held the oil and gas wells by leases, but they had no title to the realty covered by their respective leases; that the leases simply gave them a license or privilege to go upon the lands, and drill and explore for oil, and pump the same; and that the oil under the lands covered by the leases was realty until severed from the soil, and was not properly taxable to appellees. They then asked that the action of the board of supervisors in listing the oil and gas wells to them be declared to be invalid, and that the valuation as

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fixed by the assessor be adjudged to be the proper valuation of the personal property to be listed by each of the appellees. A demurrer was interposed by appellants, Wolfe county and the Commonwealth of Kentucky, which was overruled by the court, and, the appellants having declined to plead further, the court entered judgment to the effect that the oil in place and in oil wells, except as oil is produced by same, is a part of the realty and belongs to the owner of the surface until it is taken from the ground, or until the owner makes absolute deed to the oil under the surface, thus separating it from the realty, and that a lease for a term of years, or any time less than a life estate, is not such an interest in real estate as requires the tenant or lessee to pay the taxes on the leased premises. From that judgment the county of Wolfe and the Commonwealth of Kentucky are here on appeal.

It will be observed that this appeal involves the following questions: (1) Are oil and gas wells held under lease taxable? (2) If they are taxable, who should pay the tax, the lessor or lessee?

Before passing upon these questions, it may be well to advert to the general principles of law regulating the subject of taxation. It is well settled that the power to impose taxes is one so unlimited in force, so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. McCulloch v. State of Maryland, 4 Wheat. (U. S.) 431, 4 L. Ed. 579. It may touch property in every shape—in its natural condition, in its manufactured form, and in its varied transmutation. It may touch business in the almost infinite forms in which it is conducted—in profes-

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sions, in commerce, in manufacture, in transportation. State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 309, 21 L. Ed. 179. Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, franchise or privilege, occupation or right. Nothing but special constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the Legislature in its discretion shall select it for revenue purposes. Cooley on Taxation page 9. This extends to property, whether it be tangible or intangible, and it matters not in what the intangible property consists, whether privilege, corporate franchises, contracts, or obligations. It is enough that it is property, which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large proportion of the wealth of the country. People v. Tax Commissioners, 190 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65.

Bearing these principles in mind, what has the Legislature declared to be taxable? Section 4020, Ky. St. 1903, provides as follows: "All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair

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cash value, estimated at the price it would bring at a fair voluntary sale." Under this section, all property not exempted by the Constitution is made subject to taxation. It is contended, however, that property held under lease is not subject to taxation in the hands of the lessee. As a general proposition this is true, but there is a wide difference between an ordinary lease of lands and an oil or gas lease. Under the former, the lessee has only the right to occupy and cultivate the land, and take therefrom the growing crops. At the expiration of his lease, the property is intact. Its condition is substantially the same as it was when he entered upon the land. The property owned by the lessor is not diminished. Its value is practically the same. This is not true however, of an oil or gas lease. The latter carries with it not only the privilege of going upon the lands for that purpose, but the right to take therefrom during the continuance of the lease such oil or gas as may be found. The title to the oil or gas is vested by the lease in the lessee. It is his property of recognized value. He controls it and disposes of it as his own. Not only is the oil or gas property, but the lease under which it is taken from the ground is property which has substantial value and is the subject of frequent sale. If at the expiration of the lease the property be returned to the lessor ,its value has been diminished to the extent that oil and gas have been taken therefrom, and the value of the property to that extent has been enjoyed by the lessee.

It is contended, however, that the oil in situ, being a part of the realty, cannot be severed therefrom except by deed. It is admitted that the leases held by appellees are of the usual kind. They give to appellees the right to drill and operate for oil and

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gas for a definite term of years, and, in case oil or gas is found in paying quantities, to continue said operations so long as same is found in quantities that pay. Appellees agree on their part to deliver one-eighth of all oil found by reason of such operations in suitable pipe lines to the owner of the fee, the lessor, and to pay a fixed sum per year for each well the product of which is carried and marketed from the premises. The remainder of the oil or gas is the property of the lessees. Why, then, say that a deed is necessary to sever the oil from the realty, when the lease accomplishes the same result? During the continuance of the lease, the ownership of the oil or gas is vested in the lessee; and, as the lease continues so long as oil or gas may be found in paying quantities, does not the lessor part with his title to the oil in-situ for all practical purposes, for the reason that it has no value if it cannot be produced in quantities that pay? We therefore conclude that the form of contract is immaterial, and that it makes no difference whether the oil or gas privileges be conveyed by deed or lease, just so the effect of the instrument is to vest in the lessee all property rights to the oil or gas that may be found in paving quantities on the leased premises. In this view we are confirmed by the Supreme Court of West Virginia in Harvey Coal & Coke Co. v. Dillon, 53 S. E. 941, 6 L. R. A. (N. S.) 628, wherein the court said: "There can be several estates or interests, each property in a tract of land. Especially can there be a chattel real, savoring of it, issuing out of it. Several persons may have in one tract of land distinct interests which are the subject of taxation, such as land and mineral rights, or land and growing trees, or land and structures thereon. 27 Am. & Eng. Enc.

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Law, 640. The chattel is a separate property from the land, taking neither its title nor its soil in itself, vested in a different person, carved out of the fee, a particular estate distinct as a life estate. Always has the common law regarded it as a distinct property, and of value as property. Is not the lease in this case a highly valuable asset of the corporation? Has it not a distinct property in it alone? Who can say a conveyance of coal in fee does not create a separate property, taxable as such? Why is not a long lease vesting the lessee with right to take coal not a valuable separate property? The surface owner has lost dominion over the coal. The lessee has complete dominion. Still each has a property, taxable distinctly, if the State elects to do so, because they are different properties, and each one ought to pay taxes on his own property." However, if there were any doubt of the purpose of the Legislature to tax oil or gas leases under section 4120, that doubt was removed by the enactment of section 4039, which was re-enacted in Acts 1906, p. 93, c. 22, section 20, and is in part as follows: "That it shall be the duty of all persons owning any real or personal property, mineral rights or standing (branded) trees of any kind whatever, on the lands of another, or any coal, oil or gas privileges, by lease or otherwise, or any interest therein, in this State, other than in the county in which the said owners reside, or if they should reside out of the State, to list the property for taxation personally or by authorized agent, in the county where situated, at the same time and in the same manner as is now required by law of resident owners," etc. It is the contention of appellee that the above statute is a penal, and not a taxing statute, and applies only to non-residents of the county or

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State. Such contention is manifestly unsound. If that were the case, the statute itself would be unconstitutional upon the ground of unjust discrimination and lack of uniformity. The statute distinctly recognizes that the different kinds of property therein enumerated are taxable. Doubtless non-residents of the county and State were claiming that their coal, oil, and gas privileges held under leases were personal property and taxable at their domiciles, and in this manner were virtually escaping taxation thereon. The purpose of the Legislature was to fix the situs for taxation of such property in the counties where the lands covered by such leases were situated. In doing this it provided that non-resident owners (speaking of both the county and State) should list the property for taxation personally or by authorized agent, in the county where situated, at the same time in the same manner as is now required by law of resident owners. For failure to do this a penalty is provided. Manifestly, therefore, if the listing of such property were not required of resident owners, no penalty could be inflicted upon non-residents. That being the case, we think the statute applies to all owners of such property, whether resident or non-resident.

Having held that oil or gas privileges held by lease or otherwise, or any interest therein, are taxable, it remains to be determined how the tax on such property shall be apportioned between the lessor and lessee. This court in Mt. Sterling Oil & Gas Company v. C. S. Ratliff, Sheriff, etc. (not yet officially reported), 104 S. W. 993, 126 Ky. —— 31 Ky. Law Rep. 1239, recently laid down the rule that the lessor or owner who, by the terms of the lease, receives one-sixteenth of the oil produced from the

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leased premises, should pay taxes to that extent, and that it was immaterial by what name such property was called, whether personal property, a chattel real, incorporeal hereditament, or privilege, it was nevertheless property and as such was taxable under section 4039, Ky. St. That being the case, it necessarily follows that appellees are not taxable upon the whole value of their oil or gas privileges. From that value there should be deducted that portion thereof represented by the amount of oil reserved to the lessor. The remainder is taxable against the appellees.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

CASE 27.—ACTION BY W. W. EUBANK AGAINST MONTGOMERY COUNTY FOR SERVICES AS SUPERVISOR OF COUNTY ROADS.—November 21.

Eubank v. Montgomery County

Appeal from Montgomery Circuit Court.

A. W. YOUNG, Circuit Judge.

Judgment for defendant, plaintiff appeals—Affirmed.

Officers—De Facto Officers—Right to Compensation.—One who is merely a de facto officer and knows that his right is disputed, though not guilty of usurpation of the office, is not entitled to the emoluments of the office, without regard to whether there is another entitled to and claiming the office.

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C. C. TURNER, Attorney for appellant.

JAS. H. HAZELRIGG and JNO. E. COOPER of counsel.

POINTS AND AUTHORITIES.

1. Where there is no de jure officer, a de facto officer who has rendered the service, may recover compensation therefor; the rule that the right of compensation follows the title to an office is made for the benefit of the de jure officer and not to enable the public to avoid payment for services rendered by one of its citizens. There being no legal title in any one, the right to compensation follows the prima facie and best title. (Behan v. Board of Prison Commissioners (Arizona), 31 Pac. Rep., 521; Adams v. Directors of Insane Asylum (Arizona), 40 Pac. Rep., 185; Nall v. Coulter, Auditor, 25 Ky. Law Rep., 1891; State v. Draper, 48 Mo., 216; Meachem on Public Officers, section 331; Eubank v. Comth., 31 Ky. Law Rep.; Henry v. Comth., 31 Ky. Law Rep.)

2. Where the right to compensation can not follow the legal title because there is no one having it, the right is incident to and should follow the rendition of service. (Erwin v. Jersey City, 6 N. J. L., 141; Gorman v. Commissioners, 1 Idaho, 655.)

C. F. THOMAS, County Attorney, for appellee.

POINTS AND AUTHORITIES.

1. Fiscal courts can not create offices without statutory authority. (Fleming County v. Howe, 89 S. W. 225, 28 Ky. Law Rep. 458.)

2. Municipal corporations or counties can not become indebted for personal services rendered them upon implied assumpsit. (Morgantown Deposit Bank v. Johnson, Sheriff, etc., 108 Ky., 507; Perry County v. Engle, 76 S. W. 382, 25 Ky. Law Rep. 813; Wortham v. Grayson County Court, 13 Bush, 53; City of Covington v. Hallam & Myers, 16 Ky. Law Rep., 128; McDonald's Admx. et al. v. Franklin County, 100 S. W. 861, 30 Ky. Law Rep. 1245; Am. & Eng. Ency. of Law, vol. 7, p. 947; Epperson v. Shelby County, 7 Lea (Tenn.), 275.)

3. De facto officer can not claim compensation for official services. (Comth. ex rel. Bowman v. Slifer, 64 Am. Dec. (Pa.), 680; Mathews v. Supervisors of Copiah County, 24 Am. Rep., 715; Henderson County v. Dixon, 63 S. W. 756, 23 Ky. Law Rep., 1204; Ky. Stats., section 4748b, subsection 6; sections 4313, 4315.)

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OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

W. W. Eubank presented to the Montgomery fiscal court a claim for $600 for services as supervisor of roads from April 1, 1905, to January 1, 1906. The fiscal court allowed the claim. The county appealed to the circuit court, and the circuit court disallowed the claim. From that judgment Eubank appeals.

The facts of the case are set out in Eubank v. Commonwealth, 126 Ky. —, 31 Ky. Law Rep. 746, 103 S. W. 368. That was a proceeding against Eubank for usurpation of office. We there held that Eubank was a de facto officer, and that he was not guilty of usurpation of office under our statute. The general rule is that a de facto officer is not entitled to the emoluments of the office. In Commonwealth v. Slifer, 25 Pa. 23, 64 Am. Dec. 680, the court thus stated the rule: "His acts are good so far as others are concerned. But the rule seems to be established that none but the officer de jure can successfully claim compensation for official services." In Matthews v. Copiah County, 53 Miss. 715, 24 Am. Rep. 715, where a similar question was made, the court said: "The question at issue here is whether he can assert against the State or against a county, which is a constituent part of the State, a demand for official fees which he claims to have earned by a violation of her Constitution. If he can do so, there is an end at once between a de jure and a de facto officer, since it is impossible to perceive how the latter, while undisturbed by quo warranto, occupies a position at all inferior to the former. The acts of both are alike valid, both would be alike protected from the assaults

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of private persons, and each would have an equal claim upon the State for compensation. Such a construction of the law would be a direct encouragement to usurpation of office. The intruder or the incumbent wrongfully holding over would be liable, indeed, to be ejected at the end of a long and costly litigation, but in the meantime he would have grown rich by the fees and salaries which he would have extorted from the State, whose laws he had violated in holding the position."

It is insisted for the appellant that the above is the rule where there is one who is rightfully entitled to the office, but that the rule has no application where there is no other claimant of the office. In support of this distinction, we are referred to Behan v. Prison Commissioners, 3 Ariz. 31 Pac. 521, and Adams v. Insane Asylum, 4 Ariz. 327, 40 Pac. 185. It was held in the first of these cases that a superintendent of the prison who had been appointed by the commissioners and had performed the services should be paid, although it was subsequently held that the Governor was the only person who could make the appointment. There are some other cases to the same effect, but the weight of authority is to the contrary. 8 Am. & Eng. Encyc. 812. Waiving the question whether the fiscal court of a county may create a claim upon the county under our statute by implication from its conduct when it did not do so by record, we are satisfied that in the case at bar Eubank was standing on his legal rights with notice that his right was disputed, and that he took the risk of his right being upheld. A man cannot be allowed to hold on to an office to which he is not entitled when he knows his right to the office is denied and then claim compensation for his services after it is held that he had

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no right to the office. By holding on to the office under such circumstances he takes the risk of his right being established. The record leaves no doubt that Eubanks knew in April that his right to the office was denied, and that from that time on he insisted upon holding to the office notwithstanding this. We have held that he could not be punished for usurpation of office, and, if we should now adjudge him entitled to the emoluments of the office, he would be in the same status as if he had been adjudged the office. It is a sound rule of public policy that those who hold public offices without right are not entitled to the emoluments of the office. Their acts are valid as to third persons for the protection of the public, but they are invalid as to themselves, for the discouragement of the seizure of public offices. If their acts are invalid as to themselves, they cannot be adjudged compensation from the public for these acts.

Judgment affirmed.

NINN, J., dissents from so much of the opinion as holds Eubank not entitled to pay from April to October, 1905, when there was no other claimant to the office.

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CASE 28.—ACTION BY I. R. HOLLON AGAINST THE CAMPTON FUEL & LIGHT COMPANY FOR THE NEGLIGENT BURNING OF HIS HOUSE.—November 22.

Hollon v. Campton Fuel & Light Co.

Appeal from Wolfe Circuit Court.

ROBERT RIDDELL, Circuit Judge.

Judgment for defendant, plaintiff appeals—Affirmed.

1. Gas—Injuries Incident to Operation of Works—Pleading—Construction.—Where, in an action against a fuel and light company for the destruction of a customer's house by fire, in that the company negligently permitted an unusual flow of gas to pass through its mains, there was nothing in the complaint to show that the unusual flow was of such force as to destroy the valve in the customer's house by which he was enabled to regulate the flow, it is to be presumed that the flow was not of such a pressure.
2. Same.—Where, though an unusual flow of gas is permitted by a fuel and light company to pass through its mains, it is not of such pressure as to destroy the valve which the customer has to regulate the volume of gas which is supplied to his light or fire burners, the company is not liable for damages resulting from such flow.
3. Same—Admissibility of Evidence.—Evidence of the customer's neighbors that along about the time the house burned the flow of gas through the pipes in their houses was unusually strong was competent without proof that such houses were located with reference to the main line practically the same as the house burned and that the equipment for regulating the flow was practically the same, where the size of the town was such that the pipe and equipment were necessarily practically the same and the company did most, if not all, of the work of installation.
4. Same.—Evidence that about an hour and a half before the fire witness tested the pressure in one of the pipes of the

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company in another house, and found it above the reasonable and proper pressure, was not connected sufficiently close to the time of the fire to entitle it to any weight, and should not have been admitted.

5. Same.—Evidence as to the condition in which the "by-path" and "regulator," which were the apparatus by means of which the pressure of gas was regulated, were found the morning following the night of the fire, was improperly admitted.

6. Trial—Taking Case from Jury—Sufficiency of Evidence.—Where the evidence is equally consistent with either view, the existence or non-existence of negligence, the court should not submit the case to the jury, for the party affirming negligence has failed to prove it.

7. Gas—Injuries Incident to Operation of Works—Actions—Sufficiency of Evidence.—Evidence held to show that the fire might have been due to any one of other causes as likely as that of the company's negligence; and hence it was error not to direct a verdict for the company.

L. T. HOVERMALE and S. G. SAMPLE for appellant.

1. All the recognized authorities bear out the contention of appellant that a person or corporation who furnishes natural gas, or any dangerous substance to consumers for a consideration, must exercise not only ordinary but extraordinary care in protecting the lives and property of the consumers. A failure to use this care is negligence and renders them liable to the injured parties for the damage that results from the failure to do so. (Ohio Gas Fuel Co. v. Andrews, 29 L. R. A., 337; 8 Am. & Eng. Ency. of Law, p. 1273; Oil City Gas Co. v. Robinson, 99 Pa., p. 1.)

2. Where there is any evidence tending to establish the contention of the plaintiff, the court should not give a peremptory instruction, but should allow the case to go to the jury on an issue of fact. (Eskridge's Exr. v. Cin., N. O. & T. P. Ry. Co., 12 S. W., 580; Buford v. L. & N. R. R. Co., 82 Ky., 286; Thompson v. Thompson, 17 B. Mon., 22; Payne Clothing Co. v. Payne, 54 S. W., 709.)

JOUETT, BYRD & JOUETT for appellee.

POINTS AND AUTHORITIES.

We think that the record in this case shows that the petition as amended was defective, and that the demurrer to same should

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have been sustained; that the court should have sustained the motion for a peremptory instruction,

(1) Because the pleadings were not sufficient to support a judgment.

(2) Because the evidence does not show any negligence on the part of defendant.

(3) Because the evidence and petition show conclusively that the plaintiff was guilty of contributory negligence.

We, therefore, insist that there is o error in the decision of the lower court and that the same should be affirmed.

AUTHORITIES CITED.

Ibach v. Huntington Light & Fuel Co., 55 N. E., Rep.; Exploring Co. v. Painter, 1 Ind. App., 587 (249, 28 N. E. Rep., 113); Indiana Natural & Illuminating Gas Co. v. New Hampshire Fire Ins. Co. (Ind. Sup.), 53 N. E., 485; Gas Co. v. Baker, 146 Ind., 600, 45 N. E. 1049; Mast, Crowell & Kirkpatrick v. Lehman, 100 Ky., 464; Hally v. Boston Gas Light Co., 69 Am. Dec., 233; Adams v. Inhabitants of Carlisle, 21 Pike, 146; White v. Winnissimmet Co., 7 Bush, 155; 2 Greenleaf Ev., section 473; Thornton's Law Relating to Oil and Gas, section 6?2; Lee v. Troy Citizens' Gas Light Co., 98 N. Y., 115; Am. & Eng. Ency. of Law, 2d Ed., vol. 14, p. 942; Hulett v. Pudsey Gas Co., 28 Gas J., 663: Am. & Eng. Ency. of Law, 2d Ed., vol. 14, p. 942; L. & N. R. R. Co. v. Cox, 8 Ky. Law Rep., 961; Bush v. Grant, 22 Ky. Law Rep., 1766; Am. & Eng. Ency of Law, 2d Ed., vol. 7, p. 454; Prideaux v. City of Mineral Point, 28 Am. Rep., 558; Gaynor v. Old Colony, etc., R. Co., 100 Mass., 208; Murphy v. Dean, 101 Mass., 466; Merrill v. Hampden, 26 Me., 234; Park v. O'Brien, 23 Conn., 299; Schofield v. Chicago, etc., R. Co., U. S. Sup. Court, May 14th, 1885; Payne Clothing Co. v. Payne, 54 S. W. Rep., 709; Eskridge's Exr. v. Cincinnati, N. O. & T. P. Ry. Co.

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

Appellant's dwelling house in the town of Campton was burned, and he instituted suit in the Wolfe circuit court seeking to recover of appellee damages in the sum of $1,000 therefor, alleging that the house was set on fire and burned by reason of the negligence

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and carelessness of appellee company, in this: that the company, through its agents and employes, had turned into the gas pipe which supplied gas to appellant's house an unusual quantity of gas, thereby increasing the flames to such an extent as to cause the destruction of his home. A demurrer having been overruled, appellee denied the allegations of the petition, as amended, alleging negligence or carelessness on its part, and pleaded contributory negligence on the part of appellant. A reply traversing the plea of contributory negligence completed the pleading. A jury was impaneled and the trial proceeded with. At the close of plaintiff's testimony, the court, on motion of defendant, peremptorily instructed the jury to find for the defendant, and because of this ruling of the trial court plaintiff prosecutes this appeal.

It is insisted on the part of appellant that the court erred in taking the case from the jury, while, on the other hand, appellee insists that the trial court erred in overruling its demurrer to the petition. We will first consider the sufficiency of the petition. Plaintiff states in both his petition and his amended petition that he had a valve in the pipe in his dwelling by means of which he could regulate the flow of gas; the language of the petition being as follows: "In order to have gas sufficient to maintain fires and lights, the customers of said defendant company were compelled to open cocks, valves, and stops to their fullest extent, and that, while said cocks, valves, and stops were so open and without notice to said consumers, the defendant company negligently turned or permitted to be turned on the flow of gas, etc." In the amended petition this language is used: "The defendant company had, just before the burning, been supplying the plaintiff's said house with a small quantity or volume

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of gas for fuel or light, and plaintiff was compelled, in order to get even a small supply, to keep the valves in the house and fire places open, at least, to some extent, in order to receive any heat or light." Thus we have in both the petition and the amended petition the allegation on the part of the plaintiff that he had within his own means in his house the power to regulate and control the volume of gas which was supplied to his light or fire burners. So that, while the petition alleges that the defendant company, through its agents and servants, permitted an unusual volume of gas to flow through the pipes which supplied plaintiff's house, yet we have at the same time the further allegation that the plaintiff had under his own control the means by which this supply of gas was regulated. It is therefore insisted by appellee that, even though it was guilty of negligence in permitting an unusual flow of gas into the pipes, still, unless that flow was shown to be so heavy as to burst and destroy the pipes, thereby placing the regulation of the flow of gas beyond appellant's control, that appellant cannot recover, for the reason that the injury is the result not of any negligence on the part of appellee in permitting an unusual flow of gas through the main, but is directly chargeable to the neglect of appellant in failing to regulate the flow of gas passing from the main into his burners. There is nothing in the pleading to show that the unnatural and unusual flow of gas which it is charged that appellee permitted to pass through its main was of such a force as tended to and did destroy the usefulness of the valve or key in appellant's house by which he was enabled to regulate the flow of gas, and, construing the pleading most strongly against the pleader, it is to be presumed that the gas in the main was not of

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such a pressure. Reduced to its final analysis, the petition, as amended, charged that an unusual flow of gas was permitted to pass into the main, but that it was not of such a force as destroyed the valve or means which appellant had to regulate and control the volume of gas flowing into his burners. Such allegations do not support a cause of action, and the demurrer to the petition should have been sustained.

We come next to a consideration of the question as to whether or not the court erred in taking the case from the jury. Appellant, for himself, testified that on the evening of the day upon which the house was burned somewhere about 7 o'clock he and his wife took their infant child and went to the house of a neighbor nearby to attend a dance; that, before leaving his house, he turned the valve regulating the flow of gas to the fire burners so as to permit but a small flow of gas, and in this condition left it; the flame not being over one or two inches high. Along about 11 o'clock at night the alarm of fire was given, and, upon hurrying home, he found his house on fire, and the flame from this burner rising several feet above the mouth of the burner. He made no effort at that time to turn off the valve to extinguish the flame from the burner, but devoted his energies to removing his furniture from the house. He further testified that the flow of gas was stronger at some times than at others, and that it was especially stronger at nighttime than it was in the daytime and early evening. He proved by several of his neighbors that along about the time that the house burned, the flow of gas through the pipes in their houses was unusually strong and heavy, and one of them testified that, in order to keep the flame from setting fire to the mantel, it had to be extinguished entirely. To this

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testimony, as to the condition of the flow of gas in the other houses, appellee company strongly objected, but the court overruled its objection and permitted the testimony to go to the jury. Appellant introduced a witness, Leverett, who stated: That at the time of, or just before the fire, he was in the employ of appellee company. That he was familiar with the gas business and had been for some years a "gas fitter." That the appellee company's line was equipped with apparatus by means of which it could regulate the pressure of the flow of the gas that passed through its pipes or lines. This apparatus consisted of a "regulator" and a "by-path." That the reasonable and proper pressure for grates, stoves, and lamps located in the town of Campton should be and was about eight ounces. That about an hour and a half before the fire he tested the pressure in one of the pipes of appellee company in another house in Campton, and found the pressure to be about four pounds. That the pressure in the pipe, if the "regulator" was left open, could reach a maximum of 1 1-2 pounds, and, if the appliance known as the "by-path" was left open the pressure would be about the same as the pressure from the well, and the well pressure was at that time something like 300 pounds. That on the morning following the fire he found the "by-path" standing open and the "regulator" was not in use, and that, therefore, the entire pressure of the gas as it flowed from the well could and did pass into the town through the mains and pipes of appellee company. That the "by-path" and the "regulator" were both located between the well and the point at which he examined the pressure, and found it to be about four pounds. Appellee also objected to the introduction of this testimony,

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but the objection was overruled, and it was permitted to go to the jury. Appellee insists that, before the court could have permitted the introduction of the evidence to the effect that other houses in the town were supplied with an unusually strong flow or pressure of gas on the night in question, appellant should have been required to show that said houses were located, with reference to the main line, practically the same as his house was, and that the equipment for supplying and regulating the flow of gas to said houses was practically the same. This contention, however, we think is not well taken, for the reason that in a town the size of Campton the pipe and equipment for supplying the several houses therein with gas is necessarily practically the same, and this is especially true where all of the work or practically all of it is done by the same company, and the proof in this case shows that appellee did most, if not all, of this work. The effect of this testimony could only go to show that the flow of gas through the main and pipes of appellee company was at this time stronger than it had been earlier in the evening of the same day, and testimony of this same character had already been offered in evidence by appellant. As to the testimony of the witness Leverett, we are of opinion that his testimony as to his examination of the pressure of the gas in the pipe is not connected sufficiently close to the time of the fire to entitle it to any weight or consideration, nor is his testimony as to the condition in which he found the "by-path" and "regulator" the following morning such that it should have been permitted to go to the jury, for the reason that their condition the morning following the fire is no evidence as to the condition in which they were at the time of the fire, and, in fact, his own testimony

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shows conclusively, if it shows anything, that at the time he made the test or examination the "regulator" and "by-path" both could not have been open else the pressure would have been nearer 300 pounds than 4 pounds. The sum total, then, of appellant's testimony, is that before leaving home he turned the valve in his gas pipe down so as to permit the flow of but a small volume of gas; that at about the time the fire was discovered the pressure of the gas in the pipes in neighboring houses was found to be very strong, but not of sufficient force to place it beyond the regulation and control of the appliances with which the pipes in each of said housese were supplied; that, when appellant entered his home after the fire was discovered, the flames from his own gas pipe were rising several feet above the burner. Had appellant extinguished the light entirely in his gas burner before leaving home, no injury could have possibly occurred or loss resulted to him. Appellee company had no control over the pipes or valves in appellant's house, nor over the apparatus which regulated the supply of gas to the fire burners. These were all under the exclusive control and management of appellant. He knew how to operate same. He knew that the pressure of the gas through the main varied, and that late in the evening it was stronger than at other times, and in the full possession of this knowledge, before leaving home, he attempted to so arrange the valve as to keep but a small fire during his absence. With the fire in this condition, he left his home, and he offers no testimony as to what took place between that time and the time when his home was discovered on fire. The natural presumption from his testimony is that the house caught fire from the burning gas, but this is by no means certain. It

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might have been set on fire. It may have been entered during his absence, and the valve turned on so as to permit a full flow and pressure of gas through the pipe, or the valve may have been out of order, so that it was not suitable to regulate the flow and pressure of the gas. Any or all of these theories are as plausible as that the fire was caused by the gas company's negligently permitting an unusual and excessive flow of gas through the pipe, and, as has been held in the case of the Louisville Gas Company v. Kaufman, Strauss & Co., 48 S. W. 434, 20 Ky. Law Rep. 1069: "Where the question is one of negligence or no negligence, it is well settled law that where the evidence is equally consistent with either view—the existence or non-existence of negligence—the court should not submit the case to the jury, for the party affirming the negligence has failed to prove it." This same rule was laid down in the case of Hughes v. Cincinnati Railway Company, 91 Ky. 526, 16 S. W. 275, 13 Ky. Law Rep. 72, where the court held that if the evidence shows that the injury might have resulted from one or two or more causes, only one of which was due to defendant's negligence, and the inference that the injury resulted from the one cause is no stronger than that it resulted from the other, the plaintiff has failed to make out his case, and the jury should have been so directed. And in the case of Wintuska v. L. & N. R. R. Company, 20 S. W. 819, 14 Ky. Law Rep. 579, the court held that, where either one of two causes was equally plausible, a peremptory instruction should have been given, and the jury should not have been left to speculate as to the cause of the injury. So, in the case at bar, the fire may have resulted from negligence on the part of appellee in permitting an unusually heavy flow of gas

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to pass through its mains, or it may have been the work of an incendiary, or it may have been due to the carelessness and neglect of appellant in not properly setting the valve so as to regulate the flow of the gas and prevent an injury during his absence. Any one of these theories being as plausible as the other, the jury should not have been left to speculate as to the cause of the fire.

Judgment affirmed.

CASE 29.—ACTION BY SPENCER MELTON AGAINST THE LOUISVILLE & NASHVILLE R. R. CO. FOR DAMAGES FOR PERSONAL INJURIES.—November 19.

Louisville & Nashville R. R. Co. v. Melton

Appeal from Hopkins Circuit Court.

J. F. GORDON, Circuit Judge.

Judgment for plaintiff, defendant appeals—Affirmed.

1. Constitutional Law—Equal Protection of Laws.—Act Ind., March 4, 1893 (Laws 1893, p. 294, ch. 130), section 1, imposing on every railroad or other corporation, except municipal corporations, a liability for injury to an employe, where the injury is sustained as therein prescribed, applies to all persons, whether natural or artificial, operating a railroad, and is not subject, as to the operation of railroads, to the constitutional objection that it imposes on corporations burdens not imposed on individuals.
2. Same.—The act is not unconstitutional, as to a carpenter in the employ of a railroad, on the ground that the State may not establish a rule for carpenters in railroad service and

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another rule for carpenters not in such service.

3. Courts—Jurisdiction—Actions Under Laws of Other States—Comity Between Courts.—A cause of action accruing to a railroad employe under Act Ind., March 4, 1893 (Laws 1893, p. 294, ch. 130), section 1, imposing on every railroad or other corporation, except municipal, operating in that State, a liability for injury to an employe, where the injury was sustained as therein prescribed, will be enforced in Kentucky, even though the courts of Indiana would not enforce, as they doubtless would, a cause of action accruing in Kentucky.

4. Master and Servant—Action for Injuries to Employe—Question for Jury.—In an action by a carpenter for injuries due to the breaking of a chain holding a pully used in raising a bent, whether a reasonably safe appliance was furnished held for the jury.

5. Same—Instructions.—In an action by a carpenter for injuries due to the breaking of a chain holding a pulley used in raising a bent, under Act Ind. March 4, 1893 (Laws 1893, p. 299, ch. 130), section 1, imposing a liability on railroad corporations for injury to employes, where the injury is due to any defect in appliances furnished resulting from the negligence of the corporation or some person intrusted with the duty of keeping such appliances in proper condition, or where the injury results from the negligence of any person to whose order the injured employe is bound to conform, instructions that if plaintiff's injury was due to any defect in the appliances furnished, and such defect was the result of negligence by defendant's foreman of the crew with which plaintiff was working, and who was a person intrusted by defendant with the duty of keeping appliances in proper condition, and plaintiff was in the exercise of due care, he was entitled to recover; that if the injury resulted from the negligent orders of the foreman, and plaintiff was bound to conform to such foremans orders, and was exercising due care, he was entitled to recover; and that plaintiff was not entitled to recover because an appliance was not reasonably safe, if such condition was unknown to the foreman and would not have been discovered by him by the exercise of ordinary care—were in accord with the statute.

6. Damages—Excessive Amount—Personal Injuries.—Plaintiff, a carpenter, was injured by the falling of a bent which he was assisting to raise. At the time of the injury he was a healthy young man weighing 145 pounds, but at the trial weighed but 116 pounds. One leg was fractured at the knee, the other at the hip, and his ribs on one side were broken, and also

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his back. He was paralyzed from his waist down. His bowels and bladder had to be moved with an instrument, and his virility was destroyed. His suffering for six or eight weeks was very intense, and after that he was never free from pain. At the time of the injury he was capable of earning $3 a day. Held, That a verdict for $22,000 was not excessive.

Note by Reporter.—This case has been appealed to the United States Supreme Court.

WADDELL & DEMPSEY and BENJAMIN D. WARFIELD for appellant.

POINTS DISCUSSED AND AUTHORITIES CITED.

1. The Indiana statute can not be constitutionally applied to the facts of this case; nor is appellee entitled to recover under the common law of Indiana. (P., C., C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L. R. A. 875; Tullis v. L. E. & W. R. Co., 175 U. S., 348; G. C. & S. F. R. Co. v. Ellis, 165 U. S., 150; Southern Indiana Ry. v. Harrell, 68 N. E., 262; I. & G. R. T. Co. v. Foreman, 69 N. E., 669; Ballard v. Miss. Cotton Oil Co., 81 Miss. 507, 62 L. R. A. 407; Johnson v. St. Paul & Duluth R. Co., 8 L. R. A., 419; Jemming v. G. N. R. Co., 104 N. W., 1079; Dana & Co. v. Blackburn, 28 Ky. Law Rep., 695; Deppe v. Chica,o etc., R. Co., 36 Iowa, 52-55; R. Co. v. Pontius, 52 Kas. 264,, affirmed 157 U. S. 212; 4 Thompson on Negligence, sections 5311, 5294 5295, 5296, 5299; 2 Labatt Master & Servont, section 646 and notes; Foley v. Chicago, etc., R. Co., 64 Iowa 644, 21 N. W. 124; Strogle v. Chicago, etc., R. Co., 70 Lowa, 555; Luce v. Same, 67 Iowa, 75; Redington v. C., M. & St. P. R. Co., 78 N. W., 800; R. Co. v. Medaris, 60 Kas. 151, 55 Pac. 875; Holtz v. G. N. R. Co., 69 Minn., 524; Kreutzer v. Id., 83 Minn. 385, 86 N. W. 413; Cotting v. K. C. Stock Yards Co., etc., 183 U. S., 79, 108-9; Connolly v. Union Sewer Pipe Co., 184 U. S., 540-560; C. & C. Bridge Co. v. Kentucky, 154 U. S., 204; The Bedford Quarries Co. v. Bough, decided by Supreme Court of Indiana March 1, 1907; O'Neill v. R. Co. (Neb.), 60 L. R. A., 443.)

2. The Indiana statute is not enforceable in a Kentucky forum. (13 Am. & Eng. Ency. of Law, 1051, 1054; Wintuska's Admr. v. L. & N. R. Co., 14 Ky. Law Rep., 579; Bruce's Admr. v. Cincinnati R. Co., 83 Ky., 174; Taylor's Admr. v. Pa. R. Co., 79 Ky., 348; Story on Conflict of Laws, Ed. 1872, section 23; Minor Conflict of Laws, section 6; Vawter's Admr. v. N. P. R. Co., 19 A. & E. R.

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Cases, 176; St. L., I. M. & S. R. Co. v. McCormick, 1 L. R. A., 804; Railroad Co. v. Reed, 62 N. E., 488; Wabash R. R. Co. v. Fox, Admr., 64 Ohio St. 133, 59 N. E. 888; B. & O. R. Co. v. Chambers, 73 Ohio St. 16, 76 N. E., 91.)

3. Appellant was entitled to a judgment on the pleadings. (Malott v. Semple, 74 N. E., 245; R. Co. v. Harrell, 68 N. E., 262; R. Co. v. Foreman, 69 N. E., 669; Coal Co. v. Peterson, 43 Am. St. Rep., 327; R. Co. v. Jones, 130 Ala., 456; Wheatley v. Coal Co., 122 Ala., 118; R. Co. v. Moore, 128 Ala., 434; R. Co. v. Petrit, 27 Ind. App., 120; Thacker v. R. Co., 159 Ind., 82; R. Co. v. Montgomery, 152 Ind., 1; I. R. Co. v. Shumack, 23 Ind. App., 87; Hodges v. Wheel Co., 152 Ind., 680; R. C. v. Wagner, 153 Ind., 420; R. Co. v. Foreman, 69 N. E., 669; R. Co. v. Johnson, 102 Ind., 352; R. Co. v. Brooks, 84 Ala., 138; R. Co. v. George, 94 Ala., 218; Reno, Employers' Liability, 152, 162; Dresser, Ib. 295-310; Labatt, Ib. sections 690, 695; Canal Co. v. Murphy, 9 Bush, 522; R. Co. v. Case, 9 Bush, 728; Bliss Code Pleading, 3d Ed., section 210 (a).)

4. There was no actionable negligence proven against appellant. (Labatt, sections 5885-592, 615-616; 12 Am. & Eng. Eucy., 593; R. Co. v. Harrell, supra; R. Co. v. Thacker, supra; Bedford Belt Co. v. Brown, 142 Ind. 659, 42 N. E. 359; Gauges v. R. Co., 69 N. E., 1063; Galow v. R. Co., 131 Fed., 232; Leishman v. Iron Co., 83 Pac., 30; Watts v. Beard, 45 N. Y. Supp., 873; Lindvall v. Woods, 41 Minn., 212; Beasley v. Co., 103 Mich., 196; Killen v. Faxon, 125 Mass., 485; Bridge Co. v. Castleberry, 131 Fed., 175; Bradshaw v. R. Co., 14 Ky. Law Rep., 688; Stuart v. R. Co., 15 Ind., 184; Nall v. R. Co., 129 Ind., 268; L. & N. R. Co. v. Campbell, 12 Sou., 574; Sou. Ry. Co. v. Moore, 29 Sou., 659; Wilson v. L. & N. R. Co., 4 Sou., 701; Colfax C. & M. Co. v. Johnson, 52 Ill. App., 383; Doyle v. White, 14 Misc. Rep. 417, 35 N. Y. Supp. 760; Morris v. Walworth, 63 N. E., 910; Jones v. Burford (1884), 1 Times L. R., 137.)

5. The instructions were erroneous and prejudicial. (Stone Co. v. Steel, 32 Ind. App., 52; R. Co. v. Pettit, 27 Ind. App., 124; Henderson City R. Co. v. Lockett, 98 S. W., 303; Perigo v. I. B. Co., 21 Ind. App., 338; Bedford Belt Ry. Co. v. Brown, 142 Ind. 659; R. Co. v. Harrell, 63 L. R. A., 461; R. Co. v. Thacker, 59 L. R. A., 792; R. Co. v. Foreman, 69 N. E., 669; Rounds v. Carter, 94 Me., 535; Gauges v. R. Co., 69 N. E., 1063; Galow v. . Co., 131 Fed., 242; Lishman v. Iron Co., 83 Pac., 30; Watts v. Beard, 45 N. Y. Supp., 873; Lindvall v. Woods, 41 Minn., 212; Kennedy v. Spring, 35 N. E., 779; Harnois v. Cutting, 54 N. E., 842; Ling v. R. Co., 52 N. W., 378; Bell v. Lang, 86 N. W., 95; Mayer v. Thropp, 35 Atl., 1057; Kinner v. Webber, 151 N. Y., 417; Ludlow v. Bridge Co., 76 N. Y., 343; Beesley v. Co., 103 Mich., 196; Ross v. Walker,

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23 Am. St. Rep., 160; Killea v. Faxon, 125 Mass., 485; Bridge Co. v. Castleberry, 131 Fed., 175; Labatt, p. 1981; 12 Am. & Eng. Ency., 953; Tullis v. R. Co., 175 N. S., 348; Labatt, section 649; Whitcomb v. Co., 153 Ind., 513.)

6. The court erred in admitting incompetent evidence against appellant. (L. & N. R. Co. v. Molloy's Admr., 28 Ky. Law Rep., 1113-1119.)

7. The verdict, which was limited by the instructions to compensatory damages, is very excessive, and could only have been returned by a jury actuated by passion, malice or prejudice. (L. & N. R. Co. v. McEwan, 17 Ky. Law Rep. 406, 31 S. W. 465; L. & N. R. Co. v. Creighton, 106 Ky., 42; S. C. & C. St. Ry. Co. v. Ware, 84 Ky., 267; Louisville Southern R. Co. v. Minogue, 90 Ky., 369; L. & N. R. Co. v. Long, 94 Ky., 410; C. & C. Bridge Co. v. Goodnight, 22 Ky. Law Rep., 1242; Standard Oil Co. v. Tierney, 92 Ky. 367, 96 Ky. 89; L. & N. R. Co. v. Lowe, 118 Ky., 260; L. & N. R. Co. v. Kingman, 18 Ky. Law Rep., 82; Board of Internal Improvement v. Moore, 23 Ky. Law Rep., 1885; I. C. R. Co. v. Watson, 25 Ky. Law Rep., 1360; I. C. R. Co. v. Houchins. 28 Ky. Law Rep., 499; L. & N. R. Co. v. Fox, 11 Bush, 495; Chicago, etc., R. Co. v. Jackson, 55 Ill., 497.)

GORDON & GORDON & COX and CLAY & CLAY for appellee.

QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. Actions on account of personal injuries are transitory. A resident of this State may maintain an action here for an injury inflicted in Indiana, but the right to recover is governed and controlled by the laws of Indiana. (Bruce's Admr. v. Cincinnati R. Co., 83 Ky., 174 (overruling Taylor's Admr. v. Pennsylvania Co., 78 Ky., 348); Louisville & N. R. Co. v. Whitlow's Admr., 43 S. W., 711; Ill. Cent. R. Co. v. Jordan, 78 S. W., 426; Chicago & E. I. R. Co. v. Rouse, 52 N. E., 951; B. & O. S. W. R. Co. v. Reed, 158 Ind., 25, 62 N. E. 488.)

2. The employers' liability statute of Indiana, as construed by the supreme court of that State, and as applied to the facts of this case, is not repugnant to the Fourteenth Amendment of the United States Constitution, but is a valid exercise of legislative power (Pittsburg, etc., R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582; Same v. Same, 43 L. Ed. (U. S.), 1188; Tullis v. Lake Erie, etc., R. Co., 175 U. S. 348, 44 L. Ed. 192; Indianapolis Union R. Co. v. Houlihan, 60 N. E. 943, 54 L. R. A. 787; Pittsburg, etc., R. Co. v. Lighteiser, 78 N. E., 1033; Bedford Quarries Co. v. Bough, 80 N. E., 529; Pittsburg, etc., R. Co. v. Collins, 80 N. E., 415;

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Same v. Same, 80 N. E., 845; Indianapolis St. Ry. Co. v. Kane, 80 N. E., 841; Schoolcraft's Admr. v L. & N. R. Co., 92 Ky, 233; Chicago R. I. P. R. Co. v. Stahley, 62 Fed., 363; Kansas, etc., R. Co. v. Pontius, 157 U. S. 209, 39 L. Ed. 675; Callahan v. St. Louis M. B. T. Ry. Co., 170 Mo. 473, 71 S. W. 208; St. Louis M. B. T. Ry. Co. v. Callahan, 194 U. S. 628, 48 L. Ed. 1157; Railroad Co. v. Ivey, 73 Ga., 504; Pierce v. Van Dusen, 78 Fed., 693; Kane v. Erie Ry. Co., 133 Fed., 681; Missouri P. Ry. v. Mackey, 127 U. S. 205, 32 L. Ed. 107; Missouri P. Ry. Co. v. Humes, 115 U. S. 512, 29 L. Ed. 467; Minneapolis, etc., R. Co. v. Herrick, 127 U. S. 210, 32 L. Ed. 585; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. Ed. 322; Minneapolis, etc., R. Co. v. Beckwith, 129 U. S. 26, 32 L. Ed. 585; W. W. Cargill & Co. v. Minnesota, ex rel. R. & W. Commission, 180 U. S. 452, 45 L. Ed. 619; Minneapolis, etc., R. Co. v. Emmons, 149 U. S. 364, 37 L. Ed. 771.)

3. Independent of the Indiana statute, the plaintiff is entitled to recover under the common law as administered in Indiana. (Ky. Code, section 83; 12 Am. & Eng. Ency. of Law, 948 and 950; Indiana, etc., R. Co. v. Snyder, 140 Ind. 647, 39 N. E. 912; Brazil Black Coal Co. v. Young, 117 Ind. 520, 20 N. E. 423; Kruger v. Louisville, etc., Ry. Co., 111 Ind. 51, 11 N. E. 957; Southern Ind. R. Co. v. Harrell, 68 N. E., 262.)

4. A cause of action is stated in the pleadings, both under the statute and at common law. (Goleneck v. Dean Steam Pump Co., 43 N. E., 85; Indiana, etc., Coal Co. v. Buffey, 62 N. E., 279; Chiles v. Drake, 11 Met., 149.

5. There was no prejudicial error committed by the lower court in the admission or rejection of evidence. (12 Am. & Eng. Ency. of Law, 422 and 424; Ford v. Providence Coal Co., 99 S. W., 609; Louisville Belting & Iron Co. v. Hart, 92 S. W., 951; Claxton's Admr. v. Lexington, etc., Ry. Co., 13 Bush, 636.)

6. The verdict is sustained by the evidence. (Terre Haute, etc., Ry. Co. v. Rittenhouse, 62 N. E., 297; Indianapolis St. Ry. Co. v. Kane, 80 N. E., 843; Louisville, etc., Ry. Co. v. Wagner, 53 N. E., 927; Covington & Cincinnati Bridge Co. v. Goodnight, 6 0S. W., 415.)

7. The instructions confined plaintiff's right of recovery to the Indiana statute. If error was committed it was to the prejudice of plaintiff and not the defendant. If the second sub-division of the statute is construed to apply to special orders only, the failure to use the word "special" in the instructions was harmless, as there was no evidence introduced as to any but special orders having been given by the foreman. (Indianapolis St. Ry. Co. v. Kane, 80 N. E., 843; Reeves v. French, 45 S. W., 771; Nelson v. Terry, 56 S. W., 672; Louisville Ry. Co. v. Willis, 66 S. W., 628;

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Louisville, etc., Mail Co. v. Barnes, 79 S. W., 261; L. & N. R. Co. v. Logsden, 24 Ky. Law Rep., 1566; Louisville, etc., Ry. Co. v. Wagner, 53 N. E., 927.)

8. The verdict is not excessive. The plaintiff is a physical wreck, his power to labor totally destroyed, his pain and suffering, both mental and physical, is great, and the amount awarded is no more than he was entitled to under the evidence. It certainly does not indicate passion, prejudice, or ill will on the part of the jury. (Texas, etc., R. Co. v. Kelly, 80 S. W., 1072; Galveston, etc., Ry. Co. v. Nass, 57 S. W., 910; Lake Shore, etc., R. Co. v. Topliff, 18 Ohio Cir. Ct. R., 709; Fonda v. St. Paul City Ry. Co., 79 N. W., 1043; Pittsburg, etc., R. Co. v. Simons, 73 N. E., 911; Scullin v. Wabash R. Co., 83 S. W., 760; Alberti v. New York, etc., Ry. Co., 23 N. E., 35; Same v. Same, 43 Hun., 421; Retan v. Lake Shore, etc., R. Co., 94 Mich. 146, 53 N. W. 1094; Smith v. Whittier, 30 Pac., 529.)

Additional authorities by JAS. W. CLAY for appellee.

QUESTIONS DISCUSSED AND AUTHORITIES CITED.

Constitutionality of Indiana Employers' Liability Statute as applied to an employe of a railroad company, injured while engaged in erecting or repairing a coal chute or coal tipple for a railroad company, to be used by it in coaling its engines. (MaGoun v. Bank, 170 U. S. 200, 42 L. Ed. 1042; Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923; Railroad v. Mackey, 127 U. S. 205, 32 L. Ed. 107; Railroad v. Ellis, 165 U. S. 150, 41 L. Ed. 165; Callahan v. Railway Co., 170 Mo. 473, 71 S. W. 208; Railway Co. v. Callahan, 194 U. S. 628, 48 L. Ed. 1157; Edge v. Electric Ry. Co. (Mo.), 104 S. W., 90; Railroad Co. v. Ivey, 73 Ga., 504; Railroad Co. v. Miller, 9 0Ga., 571; Railroad Co. v. Hicks (Ga.), 22 S. E., 513; Campbell v. Cook, 80 Texas, 630; Railroad Co. v. Mohrmann (Texas), 93 S. W., 1090; Sherman v. Railroad Co. (Texas), 91 S. W., 561; Railroad Co. v. Carlin, 111 Fed. R., 777; Same v. Same, 189 U. S. 354, 47 L. Ed. 849; Hancock v. Railroad Co., 35 S. E. (N. C.), 679; Rutherford v. Railroad Co., 35 S. E. (N. C.), 136; Mott v. Railroad Co., 42 S. E. (N. C.), 601; Sigman v. Railroad Co., 47 S. E. (N. C.), 420; Nicholson v. Railroad Co., 51 S. E. (N. C.), 40; Railroad Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582; Tullis v. Railroad Co., 175 U. S. 348, 44 L. Ed. 192; 1st Sup. Rev. St. U. S. pp. 901 and 903; Railroad v. Leightelser, 78 N. E., 1033; Bedford Quarries Co. v. Bough, 80 N. E., 529; Street Railway v. Kane, 80 N. E., 841; Minnesota Iron Co. v. Kane, 199 U. S., 593.)

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OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

Spencer Melton was a carpenter in the service of the Louisville & Nashville Railroad Company, and on March 2, 1905, was engaged in building a coal chute on the railroad tracks near Howell, Ind., working under a foreman named Shrode. In building the coal chute it became necessary to set up some bents, weighing about 1,200 pounds each, and 22 feet long. To raise up the bents they used a pulley, block, and tackle. The bent was raised by the hands pulling on the rope. The pulley was fastened to a square beam by an iron chain similar to those used for locking a wagon. The bent was too heavy for the men to carry it up at once. They would surge upon the rope, and thus lift it a little, and then, after catching their breath, would surge again. To prevent the bent from going back when thus lifted up, Melton, by the direction of the foreman, got a piece of timber and propped the bent, to hold it at the height to which it had been raised when the men made a surge. The foreman had a similar piece of timber and propped the bent on the opposite side from Melton. While they were thus engaged in raising the bent, the chain which held the pulley broke, the bent fell, catching Melton under it, and smashing him down upon other timbers, fracturing one leg at the knee, the other at the hip, breaking the ribs on one side, and also breaking his back. By reason of his injuries he was paralized from his waist down. The bowels and bladder have to be moved with an instrument. His virility is destroyed. He has no feeling in the right leg, or use of it, and the left is but little better. He was then

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a healthy young man, weighing 145 pounds. Now he weighs 116 pounds. His suffering for six or eight weeks was very intense, and since then while he has not suffered so much, he is never free from pain. The pain in his back is continuous. He was treated in sanitariums at Chicago, St. Louis, and Evansville, as well as by local doctors at his home. The testimony of the physicians show that his injuries are permanent. In this suit brought by him to recover for his injuries, the jury found for him and fixed his damages at $22,000. The court entered judgment upon the verdict, and the railroad company appeals.

The action was brought under a statute of Indiana, which, so far as material, is as follows:

"An act regulating liability of railroads and other corporations, except municipal, for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases, and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state; provided further, that its provisions shall not apply to any injuries sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency.

"Approved March 4, 1893.

Section 1. Be it enacted by the General Assembly of the state of Indiana, that every railroad or other corporation except municipal operating in this state, shall be liable in damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

"First: When such injury is suffered by reason of any defect in the condition of ways, works, plants,

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tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"Second: Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform and did conform.

* * * * * * * * * *

"Sec. 4. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such persons shall have been injured as a defense to the action brought in this state."

Laws 1893, p. 294, c. 130.

It is insisted for the railroad company that the act is unconstitutional in this: that it applies to corporations and does not apply to individuals whose employes may be injured. The Supreme Court of Indiana has construed the statute only to apply to railroad companies. It is held that it applies to all persons, whether natural or artificial, operating a railroad, and that it does not apply to any other business. The United States Supreme Court has affirmed the constitutionality of the statute, basing

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its judgment upon the construction of the statute given by the Supreme Court of Indiana. Railroad Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301; Tullis v. Railroad Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; Railroad Co. v. Lightheiser (Ind.) 78 N. E. 1033; Indianapolis, etc., R. R. v. Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; Bedford Quarries Co. v. Bough (Ind.) 80 N. E. 529.

It is earnestly insisted that, while the act is constitutional under these rulings as to those operating a railroad, it cannot be held constitutional as to a carpenter; that the State may not establish a rule for carpenters in the service of a railroad, and another rule for carpenters in the service of other people. We are unable to see the force of this distinction. A railroad cannot be run without bridges. Bridges cannot be build without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operating of a railroad than bridges, because the engines cannot be operated without coal. The construction of a coal tipple is therefore essential to the operating of a railroad. As has been well said, the Legislature cannot well provide for all subjects in one act. Legislation must necessarily be done in detail, and an act regulating railroads violates no constitutional provision because it is made to apply only to railroads. Indianapols, etc., R. R. Co. v. Kane (Ind.) 80 N. E. 841; Schoolcrafts Adm'r v. L. & N. R. R. Co., 92 Ky. 233, 13 Ky. Law Rep. 517, 17 S. W. 567, 14 L. R. A. 579; Chicago, etc., R. R. Co. v. Stahley, 62 Fed. 363, 11 C. C. A. 88; Callahan v. Railroad Co., 170 Mo. 473, 71 S. W.

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208, 60 L. R. A. 249, 94 Am. St. Rep. 746; Railroad Co. v. Callahon, 194 U. S. 628, 24 Sup. Ct. 857, 48 L. Ed. 1157; Railroad Co. v. Ivey, 73 Ga. 504.

The defendant also insisted that the act cannot be enforced in this State, because it provides that the decisions and statutes of other states shall not be read or considered in the courts of Indiana. It is said that the statutes of Indiana are only considered in this State by comity, and that it will not be enforced in this State when the courts of Indiana do not treat the Kentucky statutes and decisions with like comity. The section in question has been held unconstitutional by the courts of Indiana. Baltimore & Ohio S. W. R. Co. v. Reed, 158 Ind. 25, 62 N. E. 488, 56 L. R. A. 468, 92 Am. St. Rep. 293. But, aside from this, when the plaintiff was injured at Howell, Ind., a cause of action accrued to him; and this cause of action which there accrued to him he is seeking to enforce by this action. The rights of the parties must depend on the facts as they then existed. The cause of action which Melton then had the courts of Kentucky will enforce. We have no doubt the courts of Indiana do the same as to a cause of action accruing here. But, if they did not, the fact that they did not administer justice would be no reason why this court should deny justice to a litigant here. No reason of public policy exists why the courts of this State should be closed to a citizen of this State seeking to enforce a meritorious cause of action.

The proof on the trial on behalf of the plaintiff showed that the chain was not the proper one for the work in which it was used, that it was supplied by the foreman, and that he had ordered the men to use it. The proof also showed that the chain was a de-

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fective one of its kind, and that this might have been discovered by an ordinary examination of it. The broken link has been brought to this court with the record, and an examination of it indicates that the iron was not properly welded when the link was made. The plaintiff also showed that a chain of long links like this, when put around a square sill, is much more liable to pull in two at the corners of the sill, where the strain would tend to pull the link open, than it would be if the chain was stretched straight and a direct strain put upon it. The only expert who testified on the trial stated that the chain had a strength of 6,000 pounds; that the rule was that a chain would have a strength 6 times as great if the strain was steady and 16 times as great if it came by jerks. The weight of the bent here was greater than one-sixth of the strength of the chain, and in lifting the bent they put much more strain upon the chain than the weight of the bent, because, the rope being at an acute angle to the bent, a large part of the power went against the ground at the foot of the bent. In addition to this, the strain being by jerks, a much stronger chain was required, especially at the corners of the sill the strain would be great. It is apparent, from an examination of the link brought here, that the link pulled open. There was therefore proof that the master did not furnish the servant a reasonably safe appliance, and that by reason of the insufficiency of the appliance, the servant received the injuries sued for. The court properly refused to instruct the jury peremptorily to find for the defendant, and submitted the question of negligence to the jury.

The court, among other things, instructed the jury as follows: "(1) The court instructs the jury that

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if they believe from the evidence that the injury received by plaintiff, if any, was suffered by reason of any defect in the condition of works or tools connected with or in use in the business of the defendant, and that such defect, if any, was the result of negligence on the part of the defendant's foreman of a construction crew with which plaintiff was working, and who was a person intrusted by the defendant with the duty of keeping such tools or works in a proper condition, and that plaintiff was at the time he received such injury in the service of the defendant, and was at the time in the exercise of due care and diligence, then the law is for the plaintiff, and the jury shall so find. (2) If the jury shall believe from the evidence that the injury to plaintiff, if any, resulted from the negligent orders, if any, of the foreman of the construction crew with which plaintiff was working, such foreman being then in the service of the defendant, and that plaintiff at the time was bound to conform and did conform to the orders or directions of such foreman, and the plaintiff himself was at the time an employe of the defendant, in its service, and was himself at the time in the exercise of due care and diligence, then the law is for the plaintiff, and the jury will so find. * * * (5) The court instructs the jury that they cannot in any event find for plaintiff, because they may believe from the evidence that the chain with which the hitch was made was not reasonably safe, if they shall believe from the evidence such condition was unknown to defendant's foreman, W. C. Shrode, and would not have been discovered by him by the exercise of ordinary care in time to have prevented the injury."

These instructions are in accord with the statute.

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The foreman ordered the men to use the chain. He ordered them to lift the bent with the block and tackle. He ordered Melton to get a piece of timber and prop the bent, and when Melton was obeying his order, in his presence and under his personal supervision, the bent fell, by reason of the breaking of the chain, and injured him. We cannot see how the jury could have been misled in any way by the instructions. The real question in the case was whether the chain was defective, or an improper appliance; and the court by the fifth instruction told the jury that they could not in any event find for the plaintiff, on the ground that the chain was not reasonably safe, if Shrode did not know its condition and could not have discovered it by ordinary care. The instructions asked by the defendant, so far as they were proper, were embraced in those given by the court.

It is earnestly insisted that the verdict is palpably excessive and the result of passion and prejudice on the part of the jury. In a case like that before us, where a young and healthy man has been made a complete wreck, so that life must be to him a burden, a living death, a much larger verdict may be sustained than in a case where the person is killed. The plaintiff was capable of earning something like $3 a day. He was in the morning of life, and might reasonably expect to increase his earning capacity as he rose in his business. But, in view of his expectation of life, at what he had then been making, the verdict is not so excessive as to strike one at first blush as the result of passion and prejudice, when we consider the suffering that he endured and his helpless condition at the trial, when medical skill had done all that it could do for him. In other states a number of verdicts much larger have been sustained

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for injuries not so serious as those proved here. Texas, etc., R. Co. v. Kelly, 34 Tex. Civ. App. 21, 80 S. W. 1073; Fonda v. St. Paul City Ry. Co., 77 Minn. 336, 79 N. W. 1043; Pittsburgh, etc., Ry. Co. v. Simons, (Ind.) 79 N. E. 911; Scullin v. Wabash R. Co., 184 Mo. 695, 83 S. W. 760; Alberti v. New York, etc., R. Co., 118 N. Y. 77, 23 N. E. 35, 6 L. R. A 765; Retan v. Lake Shore, etc., Ry Co., 94 Mich. 146, 53 N. W. 1094; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Phillips v. London R. R. Co., 42 L. T. R. 6.

There was no substantial error in the admission or rejection of evidence The persons admitted as experts were qualified to testify as such. The weight of their evidence was for the jury. On the whole record, we see no error to the prejudice of defendant's substantial rights.

Judgment affirmed.

On Rehearing—

We are unable to see that the Indiana statute as construed in the opinion is in violation of the fourteenth amendment to the Constitution of the United States, or that any right guaranteed thereby is denied by the decision in this case. We endeavored to show this in the original opinion. We are also unable to see that the conclusion we reached is not in keepng with the construction of the statute by the Supreme Court of Indiana. Our conclusion is sustained by the following cases in other states under similar statutes: Georgia, etc., R. R. Co. v. Miller, 90 Ga. 571, 16 S. E. 939; Railroad Co. v. Koehler, 37 Kan. 463, 15 Pac. 567; Georgia, etc., R. R. v. Hicks, 95 Ga. 301, 22 S. E. 613; Campbell v. Cook, 86 Tex. 630,

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26 S. W. 486, 40 Am. St. Rep. 878; Galveston, etc., R. R. v. Mohrman (Tex. Civ. App.) 93 S. W. 1090; Sherman v. Texas, etc., R. R. (Tex. Sup.) 91 S. W. 561; Hancock v. Norfolk, etc., R. R. (N. C.) 32 S. E. 679; Rutherford v. Southern R. Co, 56 S. C. 446, 35 S. E. 136; Mott v. Southern R. R. Co., 131 N. C. 234, 42 S. E. 601; Sigman v. Southern R. R. Co., 135 N. C. 181, 47 S. E. 420; Nicholson v. Transylvania R. R. Co., 138 N. C. 516, 51 S. E. 40; Texas R. R. v. Carlin, 111 Fed. 777, 49 C. C. A. 605, 60 L. R. A. 462; Id., 189 U. S. 354, 23 Sup. Ct. 585, 47 L. Ed. 849; Edge v. Railroad Co. (Mo.) 104 S. W. 90.

The petition is overruled.

DISSENTING OPINION BY JUDGE BARKER.

I find myself unable to concur in the opinion affirming the judgment in this case, and the duty I owe myself, as well as that due the appellant, constrains me, much against my natural inclination, to state the reasons for dissenting from the conclusion reached by a majority of my Brethren.

On March 2, 1905, a carpenter's force of the Louisville & Nashville Railroad Company were constructing coal chutes near, but not upon, the tracks or roadway of the railroad company at the mines of the Ingle Coal Company, at or near Howell, Ind. The force consisted of seven laborers, including the foreman, one W. C. Shrode, and appellee, Melton. In raising, with an ordinary pulley, block, and tackle, a bent of timber weighing about 1,000 pounds from a partly horizontal to an upright position, the bent fell by reason of a latent defect in the welding of one of the links of a chain with which one of the

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pulley blocks was temporarily attached to the framework. In falling the bent fell upon Melton and produced a concussion of his spine, resulting in partial paralysis of his lower extremities. For this injury Melton brought his action against the railroad company in Hopkins circuit court, and elected to proceed under the statute of the State of Indiana commonly known as the "Employer's Liability Act." A trial of the action resulted in a verdict for compensatory damages in the sum of $22,000.

As Melton's cause of action is rested upon the Indiana statute regulating the liability of corporations for injuries received by their employes, the first question with which we are confronted is whether or not that act, as construed by the majority opinion, is constitutional, or whether, on the contrary, it is inimical to that provision in the fourteenth amendment of the federal Constitution, which guarantees to all the equal protection of the law, or, as has been said, the protection of equal laws. As the act in question is fully set out in the opinion of the court, it is not necessary to incorporate any part of it here. It is deemed sufficient to say that it prescribes a different rule of liability for those employers who may be brought within its purview from that imposed by the laws of Indiana upon other employers for injuries occuring to their employes, and unless it can be differentiated by a reasonable classification from those laws it must be held violative of the federal Constitution.

It is earnestly contended by counsel for appellant that the Indiana court of last resort has construed this act to be applicable only to those employers operating railroads, and, further, that it has limited its application to injuries occurring to employes

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engaged in the hazard of the actual operation of the railroad at the time they were hurt Whether this be so, or not, I shall not now investigate. This court has enforced the act as applying to injuries occurring to all railroad employes, whether they be at the time engaged in the active operation of the railroad as such, or whether they are engaged in what may be termed collateral occupations, among which may be included all those occupations which are merely auxiliary to the active operation of the railroad and not subject to the extreme hazard which exists in the active carrying forward of its operation. This conclusion makes it necessary to inquire whether the act, as construed, is or not inimical to the equality clause of the federal Constitution.

As said before, it is not permissible, under the federal Constitution, to impose arbitrarily upon one class burdens which are not imposed upon the community in general; nor may a Legislature arbitrarily impose a liability upon one class of employers which is not imposed upon others. Undoubtedly the State may regulate the liability of employers to their employes if the classification for regulation be based upon just and reasonable principles; but it may not arbitrarily select one class, whose liability is to be ascertained by rules more stringent than apply to employers generally doing a similar business. This principle has nowhere been more clearly and forcibly expressed than by the Supreme Court of the United States in G., C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, where the question we have in hand is discussed. In the opinion it is said: "But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that if the law deals

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alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing many cases), yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court in Yick Wo v. Hopkins, 118 U. S. 356, 369, 6 Sup. Ct. 1064, 30 L. Ed. 220: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness.'

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While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. Tested by these principles, the statute in controversy cannot be sustained."

Upon the same subject the Supreme Court, in Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, said: "The difficulty is not met by saying that, generally speaking, the State, when enacting laws, may in its discretion make a classification of persons, firms, corporations, and associations in order to subserve public objects; for this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But

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arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.'" To the same effect are Cotting v. Kansas City Stockyards Company, etc., 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, Ballard v. Mississippi Cotton Oil Company, 81 Miss. 507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 467, and Cooley on Constitutional Limitations (7th Ed.) pp. 560-563.

In view of the foregoing authority, the question recurs: Does the statute under discussion, as construed in this case, afford a reasonable or just classification when it establishes one rule of liability for injuries occurring to all railroad employes, without regard to whether they are engaged in the hazard of railroad operation, leaving the liability of all other employers subject to a less stringent rule of liability? It is a matter of common knowledge that only a small per cent. of a railroad corporation's employes are engaged in its active operation. Outside of the men operating the railroad, there is a very large class of employes who are engaged in mere clerical work, and who have no more to do with the actual operation of the railroad as such than the clerks and bookkeepers of any mercantile establishment. Railroads employ many lawyers, surgeons, and clerks. Some of them keep large forces of men engaged in cutting cross-

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ties in the forests, or in the breaking of stone for ballast, and in mining coal for the use of the engines. All are engaged in precisely similar business to that carried forward by other employers, who are confessedly not within the purview of the act. The appellee himself, at the time he was hurt, was engaged as a carpenter in building a coal chute or tipple at the Ingle coal mines, near or on the railroads right of way. It does not appear whether this chute was for the benefit of the railroad or the mining corporation; but I shall assume, in order to eliminate any question of fact, that the chute was being constructed for the purpose of coaling the railroad's engines. Now, let us suppose that the coal company had had a force of carpenters building coal chutes by the side of those being built by appellee, for the purpose of putting its coal on the cars for shipment, and that a similar accident had happened at the same time to one of its employes. The employe of the coal mining corporation, if he had sued, would have been forced to ground his action upon the common law prevailing in Indiana, while, if the majority opinion be sound, appellee could maintain his action under the statute. Assuming, for the purpose of the argument, that the two accidents were caused by identically the same mishap, we would have different rules regulating the remedy of the injured persons, although the occupation of each was precisely the same. Such illustrations could be multiplied indefinitely; but they would throw no additional light upon the discussion. The appellee, in building the chute by the side of the railroad, was subject to no more hazard than would have been the employes of the coal company, had they been engaged in building chutes for their employer. It seems to me utterly fallacious to say that the statute, when

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made to apply to the cases of those employes who are hurt in collateral occupations, does not prescribe an arbitrary rule of liability for railroad corporations for injuries to their employes, from which other employes doing identically the same business are exempt.

The view I have expressed above is supported by very high authority. In the case of Kline v. Minnesota Iron Co., 93 Minn. 63, 66, 100 N. W. 681, the Supreme Court of Minnesota, in construing a statute of that State identical in principle with the one under discussion, said: "This statute has been before the court in numerous cases, and we have uniformly held that it was intended by the Legislature to apply to 'railroad hazards,' and not to railroads as such; that the character of the employment was the test to be applied in determining its validity, and not the character of the employer. It was first construed in Lavallee v. St. Paul, etc., R. Co., 40 Minn. 249, 41 N. W. 974, where it was held that, if the statute be held to apply to railroad corporations as such, it would be invalid and unconstitutional as class legislation, for it is beyond the power of the Legislature to single out a particular class of employers and impose upon them a distinct rule of liability for personal injuries; but, if construed to apply to the character of the employment, the legislation was valid. It was accordingly held in that case that the Legislature intended that it should apply to the hazards and dangers peculiar to the use and operations of railroads, and the decision there made has been followed in all subsequent cases." In the case of Deppe v. Chicago, etc., R. Co., 36 Iowa, 52, 55: "But if the statute be so construed as to apply to all persons in the employ of railroad corporations,

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without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply upon the same terms to all in the same situation, and hence would be unconstitutional, and manifestly so. To illustrate: Suppose a railroad company employ several persons to cut the timber on its right of way, where it is about to extend its road, and the landowner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employes shall be injured by the negligence of a co-employe, and the employe of the railroad company can, under the statute, maintain an action against his employer, and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation. The law then, would not have uniform operation, but would be violative of the Constitution just as much as a law that should prescribe under the same circumstances different liabilities for merchants, for mechanics, and for laborers. The manifest purpose of the statute was to give its benefits to employes engaged in the hazardous business of operating railroads. When thus limited, it is constitutional; when extended further, it becomes unconstitutional. To the same effect are Jemming v. G. N. R. Co., 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. (N. S.) 696; R. Co. v. Pontius, 52 Kan. 264, 34 Pac. 739; Johnson v. St. Paul & Duluth R. Co., 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; Lavallee v. St. P., M. & M. R. Co., 40 Minn. 249, 41 N. W. 974; Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476.

I cannot agree to the assumption that the Supreme Court of the United States, in Tullis v. Lake Erie & Western Railroad, 175 U. S. 348, 20 Sup. Ct. 136, 44

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L. Ed. 192, upheld the constitutionality of the act in question as construed in the opinion. An examination of the opinion in the case of Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418, and the various opinions reviewed therein, will show that the Supreme Court of Indiana limited the application of the statute to the injuries of railroad employes engaged in the hazard of the active operation of the road; and it was this construction that was upheld by the Supreme Court in the case referred to above. The opinion of the Supreme Court of the United States and that of the Supreme Court of Indiana show that these courts both held that the Indiana statute, as construed by the latter court, was practically the same as the statutes of Kansas and Iowa as construed by the Supreme Court of those states. These statutes were construed without doubt to apply only to the hazard of railroading, and it was expressly said, if they had been intended to apply to all employes of railroads, they would be violative of the federal Constitution. Deppe v. Chicago, etc., R. Co., supra; Akeson v. Chicago, etc., R. Co., 106 Iowa, 54, 56, 75 N. W. 676; Railroad Co. v. Pontius, 52 Kan. 264, 34 Pac. 739; Railway Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107.

To show that the Supreme Court of Indiana was of opinion that the statute under discussion, as construed by it and sustained by the Supreme Court of the United States, is identical with the statutes of Kansas and Iowa, as construed by the Supreme Courts of those states, I copy the following excerpt from the opinion in Bedford Quarries Co. v. Bough, supra: "The employer's liability act of Kansas was the same as the Iowa act above set out (Mo. Pac. R. Co. v. Haley, Adm'r, 25 Kan. 35, 53), and the

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Supreme Court of that State, following the construction given by the Iowa Supreme Court, held in 25 Kan. 53, that it embraced only those persons exposed to the hazards of the business of railroading.' Missouri, etc., R. Co. v. Medaris, 60 Kan. 151, 154, 155, 55 Pac. 875; Mo. Pac. R. Co. v. Mackey, 33 Kan. 298, 302, 6 Pac. 291. It was held, in effect, by this court in Pittsburg, etc., R. Co. v. Montgomery, 152 Ind. 1, 8-14, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 30, that the employer's liability act of this State was capable of severance, by putting railroads in a class by themselves, and that such classification was proper on account of the dangerous and hazardous business of the operation of railroads, and that, so construed, said act, as applied to railroads, was not in violation of either said section 23 of article 1 of the Constitution of this State, or of the fourteenth amendment of the Constitution of the United States, even if unconstitutional as to the other employers and employes mentioned. In Tullis v. Lake Erie, etc., R. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, it was held that this court in the Montgomery Case treated the employer's liability act as practically the same as said statute of Iowa and Kansas, and that, so construed, it did nor arbitrarily classify railroads by name, but with regard to the business in which they were engaged, which was a proper classification, on account of the dangerous and hazardous business of operating railroads, citing Mo. Pac. R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, and Minneapolis, etc., R. Co. v. Herrick, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109, which sustained the constitutional validity of a like statute. In Pittsburg, etc., R. Co. v. Lighteiser, 168 Ind. 438, 78 N. E. 1033, 1041, 1043, this court approved the Mont-

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gomery Case, gave the employer's liability act, as applied to railroads, practically the same construction as had been given to the statutes of Iowa and Kansas on that subject, and held that putting railroads in a class by themselves was proper classification, on account of the dangerous and hazardous business of operating railroads, and that such classification is not based upon the difference in employers, but upon the difference in the nature of the employment."

Nor can I agree to the statement in the opinion that Melton was engaged in the hazard of the operation of the railroad because he was building a coal chute and coal is necessary to the operation of a railroad. The chute was entirely separated from the railroad's right of way, and the carpenters who were building it were in no danger from anything done in its operation. Railroads, in order to be operated, must have cross-ties and ballast, and must have clerks, bookkeepers, and auditors to keep their accounts, lawyers to defend their suits, and telegraphers to dispatch their trains; but none of the men employed in these occupations can be said to be engaged in the hazard of the operation of the railroad.

Believing that the statute under which this suit was brought violates the equality clause of the federal Constitution, and is therefore void, I cannot concur in the opinion of the court.

I am authorized to say that Judge LASSING concurs in this dissent.

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CASE 30.—ACTION BY R. W. BRUNK AGAINST THE OHIO & KENTUCKY RAILWAY CO. AND THE LEXINGTON & EASTERN RY. CO. TO RECOVER THE VALUE OF LOST FREIGHT.—November 22.

Brunk v. Ohio & Ky. Railway Co.

Appeal from Boyd Circuit Court.

S. G. KINNER, Circuit Judge.

From a judgment sustaining a plea to the jurisdiction of the Court plaintiff appeals—Affirmed.

1. Carriers—Connecting Carriers—Loss of Goods—Action—Jurisdiction.—In an action against an initial and an intermediate carrier for loss of goods, it appeared that the initial carrier accepted plaintiff's goods for transportation to a town in another county into which the line of neither defendant ran; the bill of lading providing that the responsibility of each company should cease on delivery to a connecting carrier. Civil Code Prac., section 73, provides that an action against a carrier must be brought in the county in which defendant, or either of defendants, resides, or in which the contract is made, or in which the carrier agrees to deliver the property. Held, That a plea to the jurisdiction of the court in the county of final destination was properly sustained.
2. Same—Limitation of Liability—Bill of Lading.—A common carrier may limit its liability for loss on connecting lines by a stipulation in the bill of lading that articles to be transported beyond its lines may be delivered to connecting lines for transportation to their destinations, and that its responsibility shall cease with such delivery.
3. Same—Construction—"Forwarding" and "Delivering" Carriers.—In a bill of lading stipulating that the liability of a forwarding carrier for loss shall cease on delivery to the connecting carrier, and that of a delivering carrier on delivery at the station of delivery, the term "forwarding carrier" applies to

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all carriers who transport goods to the delivering carrier, and the term "delivering carrier" to the carrier who actually delives the goods at their destination.

JOHN W. WOODS, Attorney for appellant.

The contention of appellant is that under sections 73 and 51 of the Civil Code of Practice he had a right to bring his action in Boyd county, the county in which appellees agreed to deliver his property, and to serve summonses on their passenger and freight agents stationed nearest the county seat of Boyd county. Appellees contend that the contract to carry was separable and that there was no agreement intered into by either the initial carrier, the Ohio & Ky. Ry. Co., or the Lexington & Eastern Ry. Co. to deliver the property in Boyd county, and that therefore section 73 of the Code does not apply.

AUTHORITIES CITED.

L. & N. R. R. Co. v. Carrico, 95 Ky., 491; Pittsburg, Chicago & St. L. Ry. Co. v. Viers, 113 Ky., 536; Chicago & E. I. Ry. Co. v. Chestnut Bros., 89 S. W., 298.

HAGER & STEWART, Attorneys for appellees. . .

PROPOSITIONS AND AUTHORITIES.

1. The contract in question conclusively shows that the undertaking of each of the appellee companies with appellant to carry the property in question, was several, and that the O. & K. Company limited its liability for damages or loss in carriage to such as might occur upon its own line, or upon the line of its connecting carrier. This it could lawfully do. (Bryant v. Memphis, etc., R. Co., 11 Bush, 597; U. S. Mail Co. v. Carrolton, etc., Co., 101 Ky., at page 622; Ireland v. M. & O. Ry. Co., 105 Ky., 400; P., C. & St. L. Co. v. Viers, 113 Ky., 526; Railroad Co. v. Tarter, 19 Ky. Law Rep., 230; Myrick v. R. Co., 107 U. S., 102; Elliott on Railroads, 1433; Hutchison on Carriers, sections 149b, 154; Southern Pac. Co. v. Interstate Commerce Com., 200 U. S., 536.)

2. The fact that the destination of a shipment received by a railroad for transportation is beyond its own line, or that it was received from another carrier to be transported to a point on its own line, does not create any joint responsibility between the connecting carriers, where the shipment over each is under

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a separate contract limiting liability for loss or injuries to such as may occur on its own line. (Myrick v. Ry. Co., supra; Hutchison on Carriers, supra; 6 Cyc., 482; and for other cases in point, Cent. Dig., vol. 9, Carriers, sections 817-818.)

OPINION OF THE COURT BY WM. ROGERS CLAY, Commissioner—Affirming.

Appellant, R. W. Brunk, delivered to appellee Ohio & Kentucky Railway Company at Cannel City, Ky., a lot of household goods to be shipped to appellant at Ashland, Boyd county, Ky. Two boxes containing a portion of the goods were lost in transit. Thereupon appellant instituted this action in the circuit court of Boyd county against appellees, Ohio & Kentucky Railway Company and Lexington & Eastern Railway Company, to recover the sum of $210, the value of the goods lost, alleging that the Ohio & Kentucky Railway Company undertook and agreed for itself and its connecting lines, including the Lexington & Eastern Railway Company, to transport said goods to Ashland, Ky., but that appellees violated their contract by failing to deliver the two boxes as agreed. Summons was had upon the Ohio & Kentucky Railway Company by services upon its agent at Cannel City, Ky., and upon the Lexington & Eastern Railway Company by service upon its agent at Lexington, Ky.; neither of the two companies having an agent in Boyd county, and each of the persons served being the agent of his company stationed nearest to Boyd county. Appellees each filed an answer in the nature of a plea to the jurisdiction, accompanied by a motion to quash the summons and the return thereon. Each pleaded, in effect, that it did not have a line of railway extending to Ashland, Boyd county, Ky., or reside in that

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county, and that the only contracts either had with appellant was to transport the goods in question over its line and deliver them to its connecting line, and that the liability of each under the contract of shipment ceased upon such delivery. A copy of the bill of lading containing the contract of shipment was filed. The trial court sustained the plea of each company to the jurisdiction, quashed the summons and return thereon, and dismissed appellant's petition.

It is the contention of appellant that section 73 of the Civil Code of Practice is applicable to this case. So much of that section as is necessary to consider is as follows: "Excepting the actions mentioned in section 75, an action against a common carrier, whether a corporation or not, must be brought in the county in which the defendant, or either of several defendants, resides, or in which the contract is made; or in which the carrier agrees to deliver the property." As neither of the appellees resides in Boyd county, and the contract was not made in that county, the jurisdiction of the Boyd circuit court depends altogether upon the question whether or not there was an agreement on the part of appellees to deliver the property in Boyd county. It is pleaded by each of appellees, and not controverted by appellant, that neither had any such agreement with appellant, but inasmuch as the bill of lading, constituting the only contract of shipment, is filed in support of the pleas to the jurisdiction, it will be necessary to consider that instrument and determine from the provisions thereof whether or not there was an agreement to deliver the goods in Boyd county. The bill of lading is in part as follows: "Received, Cannel City, 8-15, 1905, by Ohio & Kentucky Railway Company, in apparent good order, the packages (contents un-

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known) mentioned below, to be forwarded in like good order to R. W. Brunk, at Ashland, Kentucky, subject to conditions noted below. [Here follows a description of the articles.] Conditions: * * * (2) That articles agreed to be transported to points beyond the lines of this company may be delivered to connecting lines for transportation to their destination, and that upon such delivery, the responsibility of this company shall cease except as to guaranty of the freight rate to be charged thereon. * * * (6) This contract is executed and accomplished, and the liability of the common carriers thereunder terminates as to the forwarding carriers respectively on delivery to the next connecting carriers, and as to the delivering carriers of the goods or property at the station or depot of delivery," etc.

Counsel for appellant contends that the words, "To be forwarded in like good order to R. W. Brunk, at Ashland, Kentucky," constitute an agreement on the part of the Ohio & Kentucky Railway Company and its connecting lines to deliver the goods at Ashland, Ky. It will be observed, however, that whatever agreement those words import is subject to the conditions noted below, and those conditions are that the articles may be delivered to connecting lines for transportation to their destination, and thereupon the responsibility of the Ohio & Kentucky Railway Company ceases, and furthermore, that the liability of the forwarding carriers ceases on delivery of the goods to the next connecting carrier, and that the liability of the delivering carrier ceases on delivery of the goods at the station or depot of delivery. It is manifest, therefore, that there is a difference between a forwarding carrier and a delivering carrier; the former term applying to all carriers who

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transport goods to the delivering carrier, and the latter to the carrier who actually delivers the goods at their destination. Keeping this distinction in view, and taking into consideration the fact that the contract provides that the goods may be delivered to connecting lines, and that the liability of each road is limited to its own lines, it is perfectly plain that the only place where either of appellees agreed to deliver the goods was at the point of its connection with the next connecting line. The only carrier that agreed, if it received the goods, to deliver them at Ashland, Ky., was the delivering carrier, the Chesapeake & Ohio Railway Company, but that company is not before the court, nor is it sought to hold it liable on the contract of shipment. As neither of appellees agreed to deliver the goods in Boyd county, it necessarily follows that the plea of each company to the jurisdiction of the court was properly sustained.

Judgment affirmed.

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CASE 31.—ACTION BY WILLARD NICHOLS AGAINST THE CHESAPEAKE & OHIO RY. CO. AND ANOTHER FOR DAMAGES FOR PERSONAL INJURIES.—November 22.

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Nicholas v. Chesapeake & Ohio Ry. Co.

Appeal from Greenup Circuit Court.

James P. HARBESON, Circuit Judge.

Judgment sustaining defendants motion to remove case to federal court, plaintiff appeals—Affirmed.

1. Removal of Causes—Causes Removable—Original Jurisdiction.—Under the removal acts (Supp. Rev. Stats., U. S., p. 611 [U. S. Comp. St., 1901, p. 503]), providing that the circuit courts of the United States shall have original concurrent jurisdiction with the courts of the several States of all suits of a civil nature, where the matter in dispute arises under the Constitution or laws of the United States, of which the circuit courts of the United States are given original jurisdiction, etc., the right to remove exists when the federal courts are given original concurrent, though not exclusive, jurisdiction of the subject of the action.
2. Same—Safety Appliance Act.—Where, after pleas of assumed risk and contributory negligence in an action for injuries to a brakeman while uncoupling cars, plaintiff amended his petition so as to allege a violation of the federal safety appliance act (Act of Congress, March 2, 1893, ch. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174] as amended by Act of March 2, 1903, ch. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), prohibiting interstate carriers from using cars not equipped with automatic couplers, and providing that a servant injured while using cars not so equipped should not be held to have assumed the risk, the cause thereupon became one arising under the laws of the United States, and was removable to the federal court, though the petition, before amendment, stated a cause of action independent of such statute.

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ALLAN D. COLE, Attorney for appellant.

J. M. COLLINS and A. B. COLE of counsel.

POINTS AND AUTHORITIES.

Greenup Circuit Court Has Jurisdiction of the Cause.—In the first place, the Greenup circuit court has jurisdiction because having entered a final order refusing to transfer the cause it had no power at a subsequent term of court in effect to set aside that order and surrender jurisdiction.

In the second place, the Greenup circuit court has jurisdiction because if the first petition for removal be treated as a nullity, then the second petition for removal herein was not filed in time and as required by the Act of Congress in such cases made and provided.

In the third place, if the amendment be treated as standing alone, then the case was improperly transferred; because as no summons had ever been issued thereon, there was no action pending within the meaning of section 39, Civil Code, to transfer.

In the fourth place, the Greenup circuit court has jurisdiction because the setting forth of a third concurring act of negligence in an amendment to the petition does not make the one cause of action a separable controversy, since by reason of the other two acts of negligence it had already been held by the Greenup circuit court to be joint; in other words, even if the third act of negligence, standing alone, could be construed as constituting a separable controversy, yet the mere statement of it in an amendment to a petition containing the other two acts, can not destroy the pre-existent joint cause of action. (I. C. R. R. Co. v. Jones' Admr., 80 S. W., 485; Pugh v. C. & O. Ry. Co., 101 Ky., 80; Davenport v. Southern Ry. Co., 135 Fed. Rep., 962; Southern Ry. Co. v. Carson, 194 U. S., 136; Chicago Ry. Co. v. Martin, 178 U. S., 245; Railway Co. v. Dixon, 179 U. S., 92; Helms v. N. P. R. Co., 120 Fed., 389; Daugherty v. Yazoo R. Co., 122 Fed., 205; Daugherty v. Atchison, 126 Fed., 239.)

W. H. WADSWORTH, Attorney for appellees.

WORTHINGTON & COCHRAN of counsel.

CLASSIFICATION OF POINTS AND AUTHORITIES.

1. If this case was removable when the first petition for removal

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was filed, then it was properly removed, and that is an end of it so far as the State court is concerned.

2. If it was not removable, then when the amended petition was filed it became removable for the first time, and then could be removed (Ayres v. Watson, 113 U. S., 594; Powers v. R. R. Co., 169 U. S., 99.)

3. When a Federal statute is involved, even as an ingredient of the original cause, the case is a removable one. (Dowell v. Applegate, 152 U. S., 327; R. R. Co. v. Mississippi, 102 U. S., 141; Starin v. New York, 115 U. S., 248; So. Pac. R. Co. v. California, 118 U. S., 109.)

OPINION OF THE COURT BY JUDGE BARKER--Affirming.

The appellant, Willard Nichols, instituted this action in the Greenup circuit court against the Chesapeake & Ohio Railway Company and Phillip Cook to recover damages of them for an accident by which he was thrown under one of the cars of the railroad company and received injuries by which he lost one of his legs; all of which he alleges was caused by the gross negligence of the railroad corporation and Phillip Cook, who was the engineer in charge of the train under which he fell. We will not set forth the allegations of the petition with more particularity, it being sufficient for our purposes to say that it states a cause of action for damages for the injuries alleged to have been received. The answer of the appellees placed in issue the material allegations of the petition by the first paragraph. In the second it is pleaded as follows: "The defendants, further answering state that at the time of the injuries and a long time before the plaintiff, Willard Nichols, had been in the employment of the Chesapeake & Ohio Railway Company as switchman; that the apparatus used by him

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on the occasion of his injury was such as he was entirely familiar with, and that the mode used by him in uncoupling the car on the occasion stated was one with which he was also familiar; that the defects in the apparatus, if any, and the danger from accident and injury, were open and obvious, and known to the plaintiff before and at the time of his injury. Defendants state that as and for a part of the term of his employment plaintiff assumed the risks of injury from such defects and dangers. Wherefore," etc. The third paragraph pleaded contributory negligence on the part of the plaintiff. The issues were made up on these pleas by reply.

Afterwards, by permission of the court, appellant amended his petition, among other things, as follows: "He further states: That on March 2, 1893, the Congress of the United States passed a law entitled 'An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes.' That the second section of said act is as follows: "That on or after the first day of January, 1899, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' That the eighth section of said act is as follows: 'That any employe of such common carrier who may be injured by any locomotive car or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk

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thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive car or train had been brought to his knowledge.' On March 2, 1903, the said Congress passed an act in amendment of said act of 1893, which took effect September 1, 1903, and which provided, among other things, that the purpose and requirement of the former act shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce. Defendant was at all times herein mentioned a common carrier of passengers and freight for hire carrying on interstate traffic in and through the states of Virginia, West Virginia, and Kentucky. It was defendant's duty to furnish plaintiff with suitable cars, machinery, and appliances upon and by means of which such employe might safely discharge his duties by use of ordinary care and prudence. He states that the coupling device upon the car from which he lifted the pin and the car to which the lever was attached were not effectually interchangeable. Both of said cars were regularly used by defendant and its agents and servants in moving interstate commerce, and at the time and place of said injury to plaintiff the same had stopped temporarily in making their trips between two points in different states. On the date of said injury defendant and its agents and servants, including the defendant Phillip Cook, disregarding their duty, negligently and carelessly placed in the train on which plaintiff was engaged to perform services as such brakeman said cars having insecure, unsafe, and defective coupling devices, in this: that

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the couplers on each of said cars would not either couple or uncouple with each other automatically by impact, so as to render it unnecessary for plaintiff to go between said cars to couple and uncouple, contrary to the common law and to the statute of the United States Congress in such cases made and provided, all of which facts were known, or by the use of ordinary care and prudence might have been known, to defendant and its agents and servants in time to have prevented said injury, and were then unknown to plaintiff. In order to uncouple said cars as aforesaid, it was necessary for him to go between said cars to discharge his duty, and in so doing he was by virtue of said act of Congress relieved of any assumption of risk connected with the discharge of said duty. Plaintiff states that by reason of the gross negligence and carelessness of defendant and its agents and servants in failing to comply with said act of Congress, whereby he was compelled to and did go in between said cars to discharge his duty in and about the uncoupling of said cars, he was precipitated violently to and upon the track of said railroad, one of defendant's cars passing over his right leg, then and there breaking, crushing, and mangling it to such an extent as to render its amputation necessary to save his life, which was done. Plaintiff has suffered and still suffers great pain and is permanently disabled by reason of said injury."

Afterwards, within the time allowed by law, the appellee Chesapeake & Ohio Railway Company filed a petition for the removal of the case to the United States Circuit Court and executed the bond as required by law. The question of removal having been submitted to the court, the bond was approved and the case removed to the Circuit Court of the United

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States; and this judgment the appellant, Nichols, seeks to reverse on this appeal. It will be seen that by the amended petition the plaintiff pleaded a federal statute and certain facts in regard to his injury, which, if true, would relieve him of the assumption of risk which, at common law, he would otherwise have been required to take. His cause of action, therefore, rests, in part, at least, upon the construction of a statute of the United States. The question, then, arises: Was the court authorized, under this condition of affairs, to transfer the case from the State to the federal court on the ground that the suit arose under a law of the United States?

By the act of Congress relating to the jurisdiction of Circuit Courts and the removal of causes, passed August 13, 1888 (Supp. Rev. St. p. 611 [U. S. Comp. St. 1901, p. 503]), it is provided that Circuit Courts of the United States "shall have original cognizance, concurrent with the courts of the several states, of all such suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States. * * *" By section 2 of the act in question it is provided that "any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may be now pending or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the Circuit Courts of the United States for the proper district." It will thus be seen that, wherever

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the Circuit Courts of the United States have original jurisdiction of the subject-matter of the controversy, the defendants may remove the same from the state to the federal courts; the right to remove being made to turn upon the question of original jurisdiction. It will also be observed that the original jurisdiction in the federal courts is not required to be exclusive, but concurrent; and where the jurisdiction is original, although concurrent, the right of removal exists. The first question for adjudication, then, is whether this case was one which might have been instituted originally in the United States Circuit Court. If so then it could be removed; if not the petition for removal should have been overruled.

It is insisted for the appellant that his cause of action, as alleged, does not rest alone upon the federal statute but that his petition states, independently of the statute, a good cause of action for damages, and this is true; but the deduction which he seeks to draw from this condition of the pleadings is not sound. The very question we have here arose in the case of Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. Ed. 204, wherein it was contended, among other things, that Congress could not confer original jurisdiction on the Circuit Courts of the Union to try the question of law arising upon the charter of the bank, which was an act of Congress; it being urged that such cases must first be tried out in the state courts, and taken to the federal court on appeal. This position was held unsound, and concerning it Chief Justice Marshall said: "We perceive, then, no ground on which the proposition can be maintained that Congress is incapable of giving the Circuit Courts original jurisdiction in any case to which the appellate jurisdiction extends. We ask, then, if

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it can be sufficient to exclude this jurisdiction that the case involves questions depending on general principles? A cause may depend upon several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the Constitution, but to those parts of cases only which present the particular question involving the construction of the Constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those courts to take jurisdiction of the whole cause on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the Constitution, laws, or treaties of the United States a trial in the federal courts will be restricted to the insecure remedy of an appeal upon an isolated point, after it

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has received that shape which may be given to it by another tribunal into which he is forced against his will. We think, then, that, when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

The foregoing case did not involve the question of the right of removal—only the question of the right in Congress to confer original jurisdiction on the Circuit Courts of the United States; and it was there settled, once for all, that wherever a question did or might turn upon the construction of a statute of the United States, it was a case arising under the laws of the United States within the meaning of the federal Constitution, which provides that "the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States. * * *" Section 2, art. 3. In the case of Starin v. New York, 115 U. S. 248, 6 Sup Ct. 28, 29 L. Ed. 388, it is said: "The character of a case is determined by the questions involved. Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 824, 6 L. Ed. 204. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not. Such is the effect of the decisions on this subject. Cohens v. Virginia, 6 Wheat. (U. S.) 264, 379, 5 L. Ed. 257;

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Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 824, 6 L. Ed. 204; Mayor v. Cooper, 6 Wall. (U. S.) 247, 252, 18 L. Ed. 851; Gold Washing & Water Co. v. Keyes, 96 U. S. 199, 201, 24 L. Ed. 656; Tennesee v. Davis, 100 U. S. 257, 264, 25 L. Ed. 648; Railroad Co. v. Mississippi, 102 U. S. 135, 140, 26 L. Ed. 96; Ames v. Kansas, 111 U. S. 449, 462, 4 Sup. Ct. 437, 28 L. Ed. 482; Kansas Pacific v. Atchison Railroad, 112 U. S. 414, 416, 5 Sup. Ct. 208, 28 L. Ed. 794; Provident Savings Co. v. Ford, 114 U. S. 635, 641, 5 Sup. Ct. 1104, 29 L. Ed. 261; Pacific Railroad Removal Cases, 115 U. S. 1, 11, 5 Sup. Ct. 1113, 29 L. Ed. 319."

The case of Schlemmer v. Buffalo, Rochester, etc., Ry., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, involved a question similar in principle to that we have here. There Schlemmer, who was an employe of the railroad, had been killed by being crushed between the cars while undertaking to couple them. The railroad was engaged in interstate traffic, and, it was pleaded, had failed to use the automatic coupler required by the statute set up in the amended petition in this case. Upon the trial the state circuit court gave a peremptory instruction in favor of the railroad on the facts, holding that the defendant had been guilty of contributory negligence. Upon appeal to the Supreme Court of Pennsylvania that judgment was affirmed. The plaintiff, then, by writ of error, carried the case to the Supreme Court of the United States, claiming that a federal question was involved, in this: That it was alleged in the petition, and also shown by the evidence, that the railroad company was engaged in interstate traffic; that it had failed to use the automatic coupler required by the federal statute, and, therefore, the employe did not assume

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the risk of his employment, and the state court had erred in awarding a peremptory instruction; that the peremptory instruction was a disregard of the federal statute, or, at least, was a ruling that it did not apply to the case in hand. The question as presented involved a nice distinction between assumed risk and contributory negligence; it being insisted on one side that the state court had properly held that the plaintiff was shown to have been guilty of contributory negligence, and, this being true, his case failed, without reference to the application of the federal statute which relieved him from the common-law assumption of risk if the railroad failed to use the automatic coupler required. We need not go into this discussion with any minuteness, because it is sufficient for our purposes to say that a majority of the court held that the pleadings and evidence showed that a federal question was presented, and that the state court either misconstrued the federal statute, or ignored it, and the case was, therefore, reversed. The usefulness of this case here is that, although questions of general law were presented, in which the federal statute was not necessarily involved, inasmuch as the plaintiff had a right which turned upon a proper construction of the federal statute, therefore a federal question arose, and the case could be taken by a writ of error to the Supreme Court of the United States. No motion to remove was made in the case; but it establishes the principle that the case might have been removed, because it was a case which arose under a law of the United States.

Under the light of the foregoing authorities it is impossible to avoid the conclusion that the defendant was entitled to remove the case to the federal court

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after the filing of the amended petition pleading the federal statute. It may be that plaintiff could have made out a case of actionable negligence against the defendants under common law principles; but if it had appeared that, under the evidence adduced, the plaintiff, under common-law principles, assumed the risk of the accident by which he was hurt, then his right to recover, if he had such right, would rest upon the operation of the federal statute, which relieved him from the assumption of the risk in question. So that the case seems to fall necessarily in the category of cases which arise under a law of the United States, and, this being true, was removable by defendants under the federal statute regulating the jurisdiction of the United States Circuit Courts and the removal of actions from the state to the federal courts.

For these reasons, the judgment of the trial court, removing the case, is affirmed.

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CASE 32.—ACTION BY EDNA P. SHEPHEDR'S COMMITTEE AGAINST F. WEST, SUETY ON A BOND GIVEN ON APPEAL TO THE CIRCUIT COURT BY A. J. THARP, FROM A JUDGMENT IN THE COUNTY COURT AGAINST HIM IN A BASTARDY PROCEEDING.—November 26.

West v. Shepherd's Committee

Appeal from Estill Circuit Court.

ROBERT RIDDELL, Circuit Judge.

Judgment for plaintiff, defendant appeals—Reversed.

Bastards—Review of Proceedings—Judgment of Appeal—Statutory Provisions.—Ky. Stats., 1903, section 168, invests exclusive original jurisdiction of bastardy proceedings is the county court; and section 978 authorizes an appeal therein to the circuit court. Civil Code Prac., section 726, provides that an appeal shall be docketed and stand for trial as ordinary actions and shall be tried anew; and section 730 provides that, if appellant move to dismiss, it shall be at the option of the appellee either to proceed to trial on the appeal or have judgment rendered for the amount of the original judgment and costs, if in his favor, or in bar of the original judgment, if against him. Defendant on a charge of bastardy, having appealed from the judgment of the county court against him and executed a bond with surety, thereafter moved to dismiss the appeal, and the court dismissed the same and adjudged that the Commonwealth, for the use of the prosecutrix, he remanded to the judgment rendered in the county court, and directed that court to enforce the same. Held, That the judgment rendered on appeal was not in conformity with section 730, and was in fact no judgment at all, and hence no liability was shown against the surety on the

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appeal bond; the same only extending to such a judgment as the circuit court could legally render.
Judge Hobson dissenting

ROBERT B. FRIEND for appellant.

J. B. WHITE for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

In a proceeding in the Estill county court against A. J. Tharp on a charge of bastardy, judgment was rendered against him for the benefit of the infant for $30 a year for 15 years and for the costs of the action. He prosecuted an appeal to the circuit court of the county, and executed a bond, as required by Civ. Code Prac. section 724, "to the effect that the appellant will satisfy and perform the judgment that shall be rendered upon the appeal," whereupon an order was issued staying proceedings upon the county court judgment. In the circuit court the appellant moved to dismiss the appeal. That court entered the following order upon the motion: "This day came the parties, and on motion of appellant, A. J. Tharp, his appeal herein is dismissed. It is therefore adjudged that appellee is remanded to the judgment rendered herein in the court below, and said court is directed to carry out said judgment. It is therefore adjudged by the court that appellee, Commonwealth, for, etc., recover of appellant, Tharp, the cost in this suit expended." The appeal bond executed in the case was in these words (omitting caption): "A. J. Tharp having prayed an appeal rendered on the 16th day of August, 1898, by the Estill county court on a warrant for bastardy against said appellant for the sum of $30 per year for 15 years: Now, we covenant that

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the said A. J. Tharp will satisfy and perform the judgment that shall be rendered upon the appeal. Witness our hands this 16th day of August, 1898. (Signed) A. J. Tharp. J. F. West." This suit was brought by the committee appointed for the child against J. F. West, the surety, upon the foregoing bond, to recover judgment against him for the satisfaction of the installments which had accrued under the county court judgment, which had not been paid. West's demurrer to the petition was overruled. Judgment was then rendered against him; his answer presenting no defense other than is shown upon the face of the petition. He appeals.

Original jurisdiction in bastardy proceedings is vested exclusively in the county court (secton 168, Ky. Stats. 1903), while appeals may be prosecuted to the circuit court (section 978, Ky. Stats. 1903). The Code of Practice not only regulates the manner of taking such appeals, but provides what the effect is upon the judgment appealed from. When the appeal is prosecuted within the time allowed by statute, and the appeal bond executed, the judgment appealed from is merged in the appeal. The action is to be tried anew in the circuit court "as if no judgment had been rendered." Section 726, Civ. Code Prac. When a bastardy prosecution is appealed to the circuit court, it stands for trial just as if that court had original jurisdiction, and it must be proceeded with, without respect to the trial or judgment in the county court. Wiggins v. Commonwealth, 102 Ky. 40, 19 Ky. Law Rep. 1017, 42 S. W. 1106. If the appellant fails to prosecute; the Code gives an option of either of two remedies to the prosecution. It provides (section 730, Civ. Code Prac.): "If the appellant move to dismiss or fail to prosecute his appeal, it

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shall be at the option of the appellee either to proceed to trial on the appeal or to have judgment rendered for the amount of the original judgment and costs, if it was in his favor, or in bar of the original judgment if it was against him." The judgment rendered on the appeal in the action against Tharp was not in conformity to the foregoing section of the Code, nor was it a judgment at all. The surety undertook that his principal would perform the judgment of the circuit court, which means such judgment as that court could legally render and might render. But he did not undertake to perform the judgment of some other court, to which the circuit court might remand the case without authority. The order that the Commonwealth, for the use of the prosecutrix, was remanded to the judgment rendered in the court below, was not a judgment at all. It gave no relief of itself and it was not within the jurisdiction of the circuit court to give jurisdiction to a county court over a matter of which it had been divested of jurisdiction by operation of a statute of the State.

Nor is this a new question in the practice of this State. In Bennett v. Thompson, an appeal from a justice's court to the circuit court, the latter adjudged: "The court, being sufficiently advised, adjudges that the judgment of the court below be reversed, and that the appellants recover of appellee their costs herein and in the court below expended." This court held the reversal of the judgment was a nullity; that the only power the court had was to render judgment for or against the plaintiff on the merits, or, if the appeal was not regularly prosecuted or the court had not jurisdiction, to dismiss it. The court added: "And until some one of those things is done the case remains in court." We conclude

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that the action of the circuit court in Tharp's case was wholly unauthorized. The bastardy case is still legally pending there for aught that appears here. At any rate no cause of action was shown against appellant as surety on the appeal bond, and none can be shown in the state of the record here presented.

Judgment reversed, and cause remanded, with directions to sustain the demurrer to the petition.

JUDGE HOBSON (dissenting). Under section 730 of the Civil Code of Practice the Estill circuit court, when Tharp dismissed his appeal, should either have proceeded to trial on the appeal, or should have rendered judgment for the original judgment and costs. It was irregular for it to remand the appellee to the judgment rendered in the county court and direct that court to carry out its judgment. The purpose of the statute is that the case shall be tried de novo in the circuit court, and, if the appeal is dismissed, that a judgment de novo be rendered there. If this was an appeal from the judgment of the Estill circuit court, a different question would be presented; but no appeal was taken from the judgment of the Estill circuit court, and the time of taking an appeal is long passed. Although the judgment was erroneous, still, if it was not void, the obligors on the appeal bond are bound by their covenant to satisfy and perform it. The Estill circuit court had the parties before it. It had jurisdiction of the subject-matter. A judgment may be ever so erroneous, and yet this will be no defense to an action to enforce it, if it can be determined from the judgment what the court determined; for, the court having jurisdiction of the parties and the subject-matter, its judgment is conclusive upon the parties unless set aside. In arriving at what a

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judgment means, or what is its effect, the court will look not at the entry on the order book, but will consider also the record in the case; and if, from the whole record, what the court determined can be satisfactorily ascertained, the judgment will be enforced. Stewart v. Troutman, 7 S. W. 535, 9 Ky. Law Rep. 752. In Freeman on Judgments, section 45, the rule is thus stated: "If the entry of a judgment be so obscure as to not express the final determination with sufficient accuracy, reference may be had to the pleadings and to the entire record. If, with the light thrown upon it by them, its obscurity is dispelled, and its intended signification made apparent, it will be upheld and carried into effect." When the circuit court adjudged that the appellee be remanded to the judgment rendered in the county court, and directed that court to carry out its judgment, it in effect determined that Tharp should pay the amounts adjudged against him in the county court. Its adjudging the county court to carry out its judgment was in substance the same as its rendering a judgment that Tharp should pay these sums. There is no uncertainty at all as to what the court meant. The action of the county court in carrying out its judgment was under and in pursuance to the judgment of the circuit court; and if Tharp failed to pay the judgment of the county court he has not satisfied or performed the judgment of the circuit court. In 23 Cyc. 670, the rule is thus stated: "According to the modern doctrine a judgment is to be tested by its substance, rather than its form, and the form is not very material, provided that in substance it shows directly, and not inferentially, the judicial character of the act, the nature and scope of the adjudication,

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and its application to the controversy before the court."

By section 763 of the Code of Practice a void judgment may not be reversed in this court until a motion to set it aside has been made in the court which rendered it and overruled. If an appeal had been taken from the judgment in controversy, certainly it could not be held that the appeal did not lie until there was a motion in the circuit court to set aside the judgment as void; for it dismissed the appeal and gave judgment for costs. It put an end to the action and set the parties out of court. For the court to say the appeal is still pending, when it was in express terms dismissed, is for it simply to shut its eyes to the record. For this reason the case of Bennett v. Thompson, 10 Bush, 365, is not applicable; for in that case the appeal was not dismissed, but remained pending in the circuit court. The opinion is expressly rested on the ground that the appeal had not been dismissed. The judgment of the county court there had been set aside by the appeal, and the judgment of the circuit court, reversing it, added nothing to what in law had already been done. Not so here; for here the appeal is determined. Nor can it be maintained that so much of the judgment of the circuit court as remanded the parties to the judgment of the county court and directed the county court to enforce its judgment is void. The circuit court, under the statute, was authorized to re-enter the judgment of the county court, and its judgment that the county court should enforce its judgment was a determination that the defendant should pay the sums fixed by the county court. The difference is a matter of form, not of substance. Section 730 of the Civil Code of Practice is to be read in connection with section 134: "The

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court must, in every stage of an action, disregard any error or defect in the proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." There is nothing in section 730 to take from circuit courts, in appeals from inferior courts under that chapter, their character of courts of general jurisdiction. Section 730 is merely a remedial statute, and is directory. It is not mandatory, in the sense that a departure from its provisions will render the judgment of the circuit court void, where the variance from the statute is only in a matter of form, and the relief granted by the circuit court is not in substance greater than it had a right to give.

The rule is universal that statutory prescriptions in regard to the mode of proceeding by public functionaries are directory when they are not of the essence of the thing to be done. If this rule is applied to election officers, sheriffs, and the like, how much more should it be applied to statutes regulating the proceedings of the superior courts of justice. It has been held that a provision requiring the court to give its reasons for its opinion on the record or to state in writing the grounds upon whch it grants or refuses a new trial, or a statute requiring the court to instruct the jury in writing and number the instructions consecutively, are directory, and that a failure to comply with the statute would not render the judgment void. 2 Lewis' Sutherland, Statutory Construction, section 620; 20 Am. Eng. Encyc. of Law, 689. In Blimm v. Commonwealth, 7 Bush, 320, this court held that a statute requiring 10 days' notice of a special term of court was directory, and that a term held after 8 days' notice was not void. How

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much greater reason is there for applying this rule to the regulations of the Code of Practice as to the form in which a judgment shall be entered? If the judgment in this case is void because it does not conform to section 730 of the Civil Code of Practice, are all other judgments void which do not conform to other provisions of the Code? If not, what is the line of distinction? The circuit court has the same jurisdiction in a bastardy case as in any other case appealed to it, precisely the same jurisdiction that this court would have if the case were brought here; and there is no more reason for holding the judgment of the circuit court void which did not conform to the provision of the Code than there would be for holding a judgment of this court void which did not conform to some provision of the Code regulating this court. The language of the Code is not on its face mandatory, but permissive. It simply gives the appellee, if the appeal is dismissed, an option to proceed to trial or have judgment entered for the amount of the original judgment. There is nothing in it purporting a mandatory limitation on the power of the circuit court. In Sebree v. Commonwealth, 115 Ky. 740, 25 Ky. Law Rep. 121, 74 S. W. 716, where the same question arose under the same section of the Code, this court said: "Appellant suffered judgment by default in the county court. Upon appeal to the circuit court he did not file an answer controverting the allegations of the statement filed by the auditor's agent, nor did he make or offer any defense to the merits of the case. Up to this time the allegation that he had omitted to list his property for taxation for the years mentioned stands confessed. The circuit court dismissed the appeal, which left the judgment of the county court taxing the prop-

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erty in effect. We think it would have been more regular, upon the state of the record, for the circuit court to have affirmed the county court's judgment; but the form of the order is not material, as the result is the same in either case."

For these reasons, I dissent from the opinion of the court.

CASE 33.—CLARENCE STURGEON WAS DULY TRIED AND CONVICTED OF THE CRIME OF MURDER IN THE CRIMINAL DIVISION OF THE JEFFERSON CIRCUIT COURT AND SENTENCED TO BE HANGED, FROM WHICH JUDGMENT HE APPEALED, AND THE SAME WAS AFFIRMED BY THE APPELLATE COURT, AND ON APPLICATION TO THE GOVERNOR, THE 15th DAY OF NOVEMBER, 1907, WAS FIXED FOR HIS EXECUTION. ON APPLICATION TO A JUDGE OF THE CHANCERY BRANCH OF THE JEFFERSON CIRCUIT COURT, A WRIT OF INJUNCTION WAS GRANTED AGAINST THE SHERIFF OF JEFFERSON COUNTY RESTRAINING HIM FROM EXECUTING THE SENTENCE, WHICH WRIT THE SHERIFF SUBMITTED TO THE CHIEF JUSTICE OF THE COURT OF APPEALS AND ASKED ITS DISSOLUTION.

Bullitt, Sheriff, v. Sturgeon

On motion to dissolve writ of injunction restraining the sheriff from executing Clarence Sturgeon—Motion granted, whole court sitting.

N. B. HAYS, Attorney General, CHAS. H. MORRIS and LORAINE MIX for appellant.

WILLIAM A. PERRY, WILLIAM SWEENEY and ENOCH McKAY for appellee.

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Bullitt, Sheriff, v. Sturgeon.

1. Constitutional Law—Departments of Government—Infringement on Judiciary.—Fixing the time of execution in a capital case is a ministerial and not a judicial act, so that Criminal Code Prac., section 346, authorizing the Governor to name a day for the execution of the sentence when for any reason it is not carried out on the day fixed in the judgment, is not in violation of Constitution section 28, prohibiting one department of government from exercising any powers properly belonging to the other.
2. Criminal Law—Judgment—Sentence.—Criminal Code Prac. section 290, provides that, if judgment of death be pronounced, the date of execution shall be fixed in the judgment; and section 346 declares that, when a judgment of death has been affirmed, a certificate shall be transmitted to the Governor, that a warrant for the execution of the judgment may be issued by him, and declares that the Governor shall name in the warrant the day and time of execution, not earlier than that which had been fixed upon by the circuit court, and, if the execution does not take place on the day appointed by the Governor, he may from time to time appoint another day of execution, until the sentence is carried out. Held, That while the fixing of a date for the execution of a capital sentence originally is a part of the judgment under section 290, such fact does not make it a judicial act, precluding the Legislature from authorizing the Governor to fix another day in case the sentence is not enforced on the day specified.
3. Constitutional Law—State Constitution—Limitation of Powers.—The State Constitution is not a delegation of powers, but a limitation; so that wherever it has not limited the right of the Legislature, either expressly or by necessary implication, that body has power to legislate.

OPINION OF THE COURT BY JUDGE BARKER—Dissolving injunction.

This case came before the Chief Justice, as a judge of the court of appeals of Kentucky, on a motion of the appellant, A. Scott Bullitt, sheriff of Jefferson county, to dissolve the injunction restraining him from capitally executing the appellee, Clarence Sturgeon. The Chief Justice, deeming the question of sufficient importance, had the whole court sit with

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him on the hearing of the motion to dissolve, and assigned to me the duty of delivering the unanimous opinion of the judges upon the questions involved.

Clarence Sturgeon was convicted by a jury in the Jefferson circuit court, criminal division, of the crime of murder, and was sentenced to be hanged on the 25th day of January, 1907. He appealed his case to this court, and the judgment of the lower court was affirmed. The clerk of the court of appeals certified to the Governor of the Commonwealth that the case had been affirmed, and the Governor, in pursuance of the Code, fixed the 15th day of November, 1907, as the day for the execution of the defendant. On the 14th day of November, 1907, Sturgeon filed his petition in the Jefferson circuit court, chancery division, for an injunction restraining A. Scott Bullitt, sheriff, from executing him under the warrant of the Governor. The prayer of the petition asking an injunction was granted by the chancellor, and the case is now before us in the manner above set forth on a motion to dissolve the injunction.

It is the contention of the appellee, Sturgeon, that the Governor, in issuing his warrant to the sheriff to execute him, and fixing the day for the execution therein, after the original day of sentence was passed, was performing judicial acts which he is forbidden to exercise, and which are in violation of appellee's rights. Appellee's theory is based upon the following sections of the Constitution:

"Sec. 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: Those which are legislative to one; those which are execu-

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tive to another; and those which are judicial to another.

"Sec. 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instance hereinafter expressly directed or permitted."

It is urgently pressed upon us that fixing a day for the capital execution of a prisoner is a judicial act made so by the statute, and therefore, under the sections of the Constitution above set forth, the Governor has no authority for exercising a judicial function, and the statute authorizing it is void, because in contravention of the fundamental law of the State.

Section 290, of the Criminal Code of Practice, is as follows: "If judgment of death be pronounced, the day of execution thereof shall be fixed in the judgment, and shall not be less than thirty days after the judgment." Section 294: "The judgment of death must be executed by the sheriff on the day designated in the judgment between sunrise and sunset, by hanging the defendant by the neck until he is dead." These sections have been changed in certain parts of section 1137 of the Kentucky Statutes of 1903, but the change is not material to the question in hand. The following sections of the Criminal Code are important to the consideration of our inquiry:

"Sec. 293. If a judgment of death or confinement either in the penitentiary or the county jail, be pronounced, a certified copy thereof must be furnished forthwith to the sheriff, who shall thereupon execute it, and no other warrant or authority is necessary to its execution."

"Sec. 295. The only officers who shall have the power of suspending the execution of a judgment of

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death are the Governor and, in cases of insanity or pregnancy of the defendant, the sheriff, as provided in the next section; and, in cases of appeals, the clerk of the court of appeals, as prescribed in title 9, chapter 1, article 1.

"Sec. 296. If the sheriff be satisfied that there are reasonable grounds for believing that the defendant is insane or pregnant, he may summons a jury of twelve persons on the jury list, drawn by the clerk, who shall be sworn by the sheriff well and truly to inquire into the insanity or pregnancy of the defendant, and a true inquisition return; they shall examine the defendant and hear any evidence that may be presented; and by a written inquisition, signed by each of them, find as to the insanity or pregnancy. Unless the inquisition find the defendant insane or pregnant, the sheriff shall not suspend the execution; but if the inquisition find the defendant insane or pregnant, he shall suspend the execution and immediately transmit the inquisition to the Governor."

"Sec. 346. When a judgment of death has been affirmed, the clerk of the court of appeals shall transmit to the Governor a certificate of the affirmance and of the judgment of the circuit court, to the end that a warrant for the execution of the judgment may be issued by the Governor. The Governor shall send his warrant of execution by a special messenger, or by mail, to the proper officer, and shall name therein the day and time of execution, but shall not appoint an earlier day than that which had been fixed upon by the circuit court. The officer receiving the same shall report his action both to the Governor and the circuit court. If, from any cause, the execution do not take place on the day appointed by the Governor, he may,

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from time to time, appoint another day for execution, until the sentence is carried into effect."

It is not disputed by the plaintiff that all the proceedings so far as they were had under the foregoing sections have been regular; his sole contention being that the law which authorizes the Governor to fix the day for the execution, when for any reason it has been delayed beyond the original judgment time, is void. The first question, then, with which we are confronted, is whether fixing the day of execution in a criminal case is a judicial act, which cannot be conferred by statute upon the chief executive of the Commonwealth. Certainly it was not so at common law. Blackstone, in speaking of the subject in hand, says: "There now remains nothing to speak of but execution; the completion of human punishment. And this in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy, whose warrant for so doing was anciently by precept under the hand and seal of the judge, and it is still practiced in the Court of the Lord High Steward, upon the execution of a peer; though, in the Court of Peers in Parliament, it is done by writ from the king. Afterwards it was established that, in case of life, the judge may command execution to be done without any writ. And now the usage is for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff. As for a capital felony, it is written opposite to the prisoner's name, 'Let him be hanged by the neck;' formerly, in the days of Latin, an abbreviation, 'Sus. per col.,' for 'suspendatur per collum.' And this is the only warrant that the sheriff has for so material an act as taking away the life of another. It may certainly

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afford matter of speculation that in civil causes there should be such a variety of writs of execution to recover a trifling debt, issued in the king's name and under the seal of the court, without which the sheriff cannot legally stir one step; and yet that the execution of a man, the most important and terrible task of any, should depend upon a marginal note. The sheriff, upon receipt of his warrant, is to do execution within a convenient time, which in the country is also left at large. In London, indeed, a more solemn and becoming exactness is used, both as to the warrant of execution and the time of executing thereof; for the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs, directing them to do execution on the day and at the place assigned. And, in the Court of King's Bench, if the prisoner be tried at the bar, or brought there by habeas corpus, a rule is made for his execution, either specifying the time and place, or leaving it to the discretion of the sheriff. And, throughout the kingdom, by St. 25 Geo. II, c. 37, it is enacted that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed. But otherwise the time and place of execution are by law no part of the judgment." See, also, 2 Hale's Pleas of the Crown, pp. 31, 409, and 2 Hawkins' Pleas of the Crown, p. 657, note 1. So that it appears in Blackstone's time, unless a statute made the day of execution a part of the judgment, it was not so; and it was the custom for the court merely to indorse on the margin of the judgment roll, "Let him be hanged by the neck," leaving the time of execution to the discretion of the sheriff.

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The case of Schwab v. Berggren, 143 U. S. 452, 12 Sup. Ct. 525, 36 L. Ed. 218, was one of the famous "Chicago Haymarket Riot Cases." Schwab was sentenced to be hung. He sued out a writ of habeas corpus in the circuit court of the United States for the Northern District of Illinois, and upon that court sustaining a demurrer to his petition he appealed to the supreme court of the United States. Among the assignments of error was that the court had in his absence fixed the day and time of his execution, and to do this was to him a denial of due process of law. In passing on this assignment of error the court said: "Nor is the question affected by the fact that the supreme court of Illinois, under an express authority conferred by statute, fixed the time when the punishment prescribed by the judgment which it affirmed should be inflicted. Neither the statute nor due process of law required that the accused should, upon the affirmance of the judgment, be sentenced anew by the trial court to suffer the punishment of death, or that he should be present when the day was fixed by the appellate court for carrying the original sentence into execution. The judgment prescribing the punishment was not vacated by the writ of error. Only its execution was stayed, pending proceedings in the appellate court. Besides, it is well settled that the time and place of execution are not, strictly, part of the judgment or sentence, unless made so by statute."

In Holden v. Minnesota, 137 U. S. 483, 11 Sup. Ct. 143, 34 L. Ed. 734, the supreme court of the United States was reviewing a judgment of the circuit court for the District of Minnesota, which denied to the accused a discharge upon a writ of habeas corpus. Holden was charged with murder in the first degree.

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He had been found guilty and sentenced to be hung. The trial court refused him a new trial, whereupon he appealed to the supreme court of Minnesota. That court affirmed the court's judgment and remanded the case, and it was therein adjudged that at a time to be designated by the Governor he should be taken by the sheriff and hung. The Governor then issued his warrant, after which came the writ of habeas corpus. It was in conformity to a statute of Minnesota that all warrants for the execution of criminals were to be issued by the Governor, at a time to be fixed by him. The supreme court of the United States, in reviewing the opinion of the United States circuit court, said: "Among the assignments of error by the appellant is one to the effect that 'the judgment of the state district court that he be hanged at a time to be fixed by the Governor of Minnesota was not a valid exercise of judicial authority or due process of law thus to deprive him of life at such time as the executive should arbitrarily appoint.' We do not understand the counsel for appellant to press the point. But as this assignment of error has not been formally withdrawn, and as human life is involved in our decision, it is proper to say that under the law of Minnesota, at the time appellant committed the crime of which he was convicted, as well as when he was indicted and tried, the day on which the punishment of death should be inflicted depended upon the warrant of the Governor. It is competent for the State to establish such regulations, and they are entirely consistent with due process of law. The court sentenced the convict to the punishment prescribed for the crime of murder in the first degree, leaving the precise day of inflicting the punishment to be determined by the Governor. The order designating

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the day of execution is, strictly speaking, no part of the judgment, unless made so by statute. And the power conferred upon the Governor to fix the time of infliction is no more arbitrary in its nature than the same power would be if conferred by the court. Whether conferred upon the Governor or the court, it is arbitrary in no other sense than every power is arbitrary that depends upon the discretion of the tribunal or the person authorized to exercise it." It is appropriate here to say that the statute and the Constitution of the state of Minnesota relative to the question under discussion are in all substantial respects identical with our own. In the case of State of Minnesota v. Gut, 13 Minn. 363 (Gil. 315), it was said: "The defendant was sentenced on the 1st day of February, 1868, to be executed on the 3d day of April following, and on the 4th day of February the execution of judgment was stayed until the determination of this case in the court. The time of execution is not an essential part of the judgment. It is for the judge before whom the conviction is had to designate the time, not less than one nor more than six months, for which the convict shall be kept in solitary confinement, and at the expiration of that time it is the duty of the Governor to issue his warrant of execution. If for any reason his warrant is not issued immediately upon the expiration of the time fixed by the court for the solitary confinement of the defendant, he may afterwards issue it and cause the legal execution of the convict. In this case he may legally issue his warrant, though the day fixed in the sentence of execution has passed. We therefore affirm the judgment of the lower court and direct the sentence to be executed."

In the case of Lowenberg v. People, 27 N. Y. 340,

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the question we have here was thus disposed of: "By section 4 [Laws 1860, p. 713, c. 410] it was provided: 'When any person shall be convicted of any crime punishable with death and sentenced to suffer such punishment, he shall at the same time be sentenced to confinement at hard labor in the state prison until such punishment of death shall be inflicted.'' Section 5 declares: 'No person so sentenced or imprisoned shall be executed in pursuance of such sentence within one year from the day on which such sentence of death shall be passed, nor until the whole record of the proceedings shall be certified by the clerk of the court in which conviction was had under the seal thereof, to the Governor of the State, nor until a warrant is issued by the Governor under the great seal of State directed to the sheriff of the county in which the State prison may be situated, commanding the said sentence to be carried into execution.' That act expressly repealed section 25 of that portion of the Revised Statutes [1st Ed.), p. 659, pt. 4, c. 1, tit. 1] which declared that the punishment of death shall in all cases be inflicted by hanging the convict by the neck until he be dead. * * * Provision was made in section 18 of the act of 1860 for the execution of persons by virtue of the warrant of the Governor. * * * I am of the opinion that that part of section 11 of the portion of the Revised Statutes above mentioned which stated that the warrant for execution of the sentence of death, made out by the court, should appoint the day on which such sentence should be executed, was repealed by the act of 1860, which provided for the fixing of the time of execution, if ever, by the Governor. The designation of the time for executing the sentence by the Governor was entirely inconsistent with the appointment of

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such time in the warrant for execution of the sentence made out by the court. Hence conferring authority upon the Governor to fix the day for executing the sentence necessarily took away the authority before vested in the court to appoint said day. I am of the opinion that the Court of Sessions erred in adjudging that the prisoner should suffer death on a particular day. The day on which he should be executed, if ever, should have been left for the Governor to designate."

Fixing the time of execution in a capital case is a ministerial, not a judicial, act. Fielden v. People, 128 Ill. 595, 21 N. E. 584; In re Dyer, 56 Kan. 489, 43 Pac. 783; Cathcart v. Commonwealth, 37 Pa. 108; State v. Oscar, 13 La. Ann. 297. But it is said by the appellee that our statute (section 290 of the Criminal Code of Practice) makes the day of execution a part of the judgment in a capital case. This is true as an original proposition; but it is equally true that the same statute, when for any cause the execution cannot be carried into effect on the day named in the judgment, makes it the duty of the Governor to assign a new day. It is difficult to perceive any substantial reason for the position that, although it is competent for the Legislature to make fixing the day a part of the original judgment, it is incompetent for it to confer upon the Governor the authority to fix the day, when for any reason the execution is delayed beyond the time mentioned in the judgment. The whole matter is one of statutory enactment, the Legislature having the power under one set of circumstances to authorize the court to fix the day, and under another to authorize the Governor to fix the day; in other words, the naming of the day for execution is not a judicial function inherent in the court,

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within the meaning of the Constitution, which forbids either of the other co-ordinate powers of government to exercise judicial functions.

Prior to the enactment of the Code of 1854 there was no appeal from the judgments of the circuit court in criminal cases. This right was given for the first time in the history of our State by that Code, and it has remained as a part of the criminal law ever since. All of the provisions concerning the question in hand, which are in the present Code, were in that of 1854. Having given the criminal the right to appeal from a death sentence, the Legislature, in 1854, enacted the same provisions which are called in question here, that the Governor, after the affirmance by the Court of appeals, should, upon the certificate of the clerk of this court, fix another day for the execution, and that law has been upon the statute books and continuously enforced ever since. The provisions concerning the distribution of the powers of government, contained in our present Constitution, are identical with those contained in the third Constitution enacted in 1851. The Legislature, in 1854, construed that it was competent to confer upon the Governor the power of fixing the new day for the execution of a criminal, when for any reason the time set in the judgment has passed without execution; and this construction of this constitutional power was continuously enforced from 1854 until the meeting of the constitutional convention in 1891. With the construction which the Legislature had placed upon the constitutional provisions with reference to the distribution of the powers of government in the Constitution of 1851 before them, the members of the constitutional convention of 1891 readopted those provisions without change. It is hardly necessary to state that

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among the members of the last constitutional convention were many of the most learned lawyers of the State, all of whom were familiar with the legislative construction of the language distributing the powers of government under the former Constitution, and, so knowing, they re-enacted this language and with it, of necessity, the construction which had theretofore been placed upon it.

There is no imperative reason for fixing a day for the execution of the criminal in the judgment. As we have seen, at common law this was generally left to the discretion of the sheriff; and while the practice of fixing a day certainly must be approved as an orderly procedure for the enforcement of the process of the court in this most important and solemn line of cases, yet in other criminal cases no time is fixed for the sentence of the court to be carried into execution, this being left to the discretion and convenience of the sheriff. If the appellee had been sentenced to confinement in the penitentiary for life, the judgment would have contained no date for the judgment to be carried into execution. This would have been left entirely, as said before, to the convenience of the sheriff—of course, subject to the supervision of the court or the Governor, or perhaps both, if there was any unnecessary or undue delay in carrying the judgment into execution. So that the time in which the judgment is to be executed in criminal cases is not fixed in the judgment in any other than cases where the death penalty is inflicted. This could not be so if fixing the time of the execution were part of the judgment. We do not understand why, if it is competent that the time of carrying into execution the judgments in criminal cases may be left to the sheriff, as we have seen, in all instances except where

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the death penalty is inflicted, the time of fixing the day of death penalty may not under certain circumstances be confided to the chief magistrate of the Commonwealth. It will be observed that, by the terms of section 296 of the Criminal Code of Practice, if the sheriff be satisfied there are reasonable grounds for believing that the defendant is insane or pregnant, he may summon a jury and try the question, and, if the inquest finds the defendant insane or pregnant, the sheriff shall suspend the execution and immediately transmit the inquest to the Governor. Here we find the sheriff invested with the power of trying the question as to whether or not the judgment of the court shall be carried into effect. If this judicial, or quasi judicial, power can be conferred upon the sheriff, certainly there can be no reason for withholding from the Governor the power to fix the date of execution in a capital case.

It is insisted for the appellant, Bullitt, that the authority of the Legislature to confer upon the Governor the right to fix a day of execution in a capital case may be found in those sections of the Constitution which authorize him to pardon, commute, or reprieve criminals, and make it his duty to see that all laws of the Commonwealth are properly enforced. We do not think it necessary to discuss the question from this point of view. The Constitution of the State is not a delegation of powers, but is a limitation; and therefore, wherever it has not limited the right of the Legislature, either expressly or by necessary implication, then that body has the right to legislate. Having reached the conclusion that the Constitution does not limit the power of the Legislature to authorize the Governor in the matter under discussion here, it follows that we are not required

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to seek any express authority in the General Assembly so to do. So that, whether we view this question from the point of reason, or from that of authority, or from the point of view of long usage and contemporaneous construction, we are constrained to the conclusion that the statute called in question is constitutional.

We do not discuss the competency of the writ of injunction to delay a public execution, not desiring to rest so grave a matter upon a mere mode of procedure. The chancellor evidently thought the question raised upon the application should be passed upon by the Court of Appeals, and in this view we concur, and have, therefore, discussed the question upon the merits, rather than upon the technical right to issue an injunction.

For these reasons, the injunction granted is dissolved, and the clerk of this court is directed to certify our conclusion to the Governor, in order that he may designate another day for the execution of the defendant as by the statute required.

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CASE 34.—ACTION BETWEEN MARY E. MORGAN, ADMINISTRATRIX, AND JAMES W. SEGENFELTER AND OTHERS TO DETERMINE THE RIGHT TO THE PROCEEDS OF A BENEFIT CERTIFICATE ISSUED BY THE KNIGHTS OF HONOR.—November 26.

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Hess' Admr. v. Segenfelter, &c.

Appeal from McCracken Circuit Court.

W. M. REED, Circuit Judge.

From the judgment Mary E. Morgan appeals—Reversed.

1. Insurance—Insurable Interest.—In the absence of statutory prohibition, a person may take out insurance on his own life and designate whom he pleases as the beneficiary.
2. Same—Wagering Policies.—A person may not himself procure, nor obtain by assignment, insurance upon a life in which he has not an insurable interest, growing out of kinship, dependency, or the relation of debtor and creditor; nor may a person insure his own life for the benefit of any other, if that other induces him to procure the insurance and pays the premium thereon, or if the insurance was obtained with a view to evade the laws against speculative insurance.
3. Same—Mutual Benefit Insurance—Beneficiaries.—Under subdivision 3, art. 4, ch. 32, Ky. Stats., 1903, sections 678, 680, forbidding domestic assessment and co-operative life insurance companies to issue a certificate or policy upon any life in which the beneficiary named has no interest, and forbidding foreign insurance companies on the assessment plan to do business in this State until they shall file with the Commissioner of Insurance a certificate showing, among other things, that "its certificates or policies are payable only to beneficiaries having a legal insurable interest in the life of the member or insured," a member of a fraternal or benevolent organization, who obtains insurance upon his own life and himself pays the premiums, may not designate a first cousin, not

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having an insurable interest in his life, as a beneficiary, though permitted to do so by the charter of the order.

4. Same—First Cousins.—First cousins, who are not dependent on or creditors of an insured, have not an insurable interest in his life.

5. Same—Pecuniary Consideration.—Where the relationship of beneficiaries in an insurance policy to the insured is, as in the case of a husband and wife, parent and child, sister and brother, so close as to preclude the probability that mercenary motives would induce the sacrifice of life to gain the insurance, the element of pecuniary interest is not essential to the validity of the policy.

6. Same — Statutes — Retroactive Operation — Insurance. — Act March 24, 1906 (Laws 1906, p. 481, ch. 142), enlarging the power of members of fraternal societies in the designation of beneficiaries to those having no insurable interest, has no application to policies issued before its passage.

HENDRIX & MILLER and JAMES W. EDEN for appellant.

L. D. HUSBANDS and T. B. HARRISON for appellee.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

C. F. Hess died in 1904, a member in good standing of the Knights of Honor, a corporation created under the laws of the state of Missouri, "to promote benevolence and charity by establishing a widows' and orphans' fund from which, on satisfactory evidence of the death of a member of the order who had complied with all its lawful requirements, and who is at the time of his death in good standing according to the laws of the order, a sum not exceeding two thousand dollars shall be paid to said member or members of his family, blood relatives, or person or persons dependent on him, as he may direct or designate by name, to be paid as provided by general law; provided, however, any member desiring to have

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afterborn children to participate in his certificate may so designate without doing so by name"—the constitution also providing that "a member desiring to change his beneficiary may at any time while in good standing surrender his benefit certificate and obtain a new one in lieu thereof, payable as he shall have directed within the limitations prescribed by the laws of the order." In 1901 Hess surrendered the certificate he then held in this order, payable to his aunt, and upon his request there was issued a certificate for $2,000 payable to the appellees, who are his first cousins. This controversy is between the appellees and the appellant, Mary E. Morgan, the only surviving sister of Hess, who asserts claim to the fund by reason of her relationship and also as administratrix of his estate. The Knights of Honor paid the money into court, and upon hearing the case the circuit court adjudged that the appellees were entitled to the fund in controversy, and a reversal of this judgment is sought.

For appellant it is urged that appellees had no insurable interest in the life of Hess, and therefore are not entitled to the insurance upon his life under the certificate issued to him by this fraternal organization. The appellees contend that, being blood relatives of Hess, he had the right under the provisions of the charter before quoted to designate them as the beneficiaries of the fund, and the circuit court properly adjudged them entitled to it. Whether or not a member of a fraternal or benevolent organization who obtains insurance upon his own life and himself pays the premiums can designate as a beneficiary a person who has not what is generally known as an insurable interest in his life, but who is permitted to be made a beneficiary by the charter of the order, presents

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a most interesting question, and one that has attracted a great deal of attention from courts as well as text-writers. If we did not feel constrained to follow the provisions of the statute that will be hereafter noticed, we would announce the principle that the question of insurable interest was not involved, when a member of a fraternal or benevolent association in good faith obtained insurance upon his own life, and himself paid the premium, and there was no fact or circumstance connected with the transaction tending to show that it had any of the elements of a wagering or speculative contract, and rule that a person obtaining such insurance might designate any person as a beneficiary within the limits prescribed by the rules of the order. All the courts of last resort, with possibly one exception, and the text-writers on insurance generally, are agreed that a person may take out insurance upon his own life and designate whom he pleases as the beneficiary. This doctrine is based upon the sound and sensible theory that it is not reasonable to suppose that a person will insure his own life for the purpose of speculation, or be tempted to take his own life in order to secure the payment of money to another, or designate as the beneficiary a person interested in the destruction and not in the continuance of his own life. Vance on Insurance, section 49; Heinlein v. Imperial Ins. Co., 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409; Morrell v. Trenton Mutual Life Ins. Co., 10 Cush. 282, 57 Am. Dec. 92; Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; May on Insurance, section 112; Bliss on Insurance, section 76; Bacon on Insurance, section 729; Beach on Insurance, section 861; Joyce on Insurance, section 729; Bloomington Mutual Benefit Association v. Blue, 120

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Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380; N. W. Masonic Aid Ass'n v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Albert v. Mutual Life Ins. Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693. On the other hand, what is known as "wagering or gambling insurance" is universally condemned, and our court, in harmony with the doctrine generally prevailing, is strongly committed to the principle that a person cannot himself procure insurance upon a life in which he has not an insurable interest, growing out of a kinship, dependency, or the relation of debtor and creditor, nor obtain an assignment of such insurance; nor will a person be permitted to insure his own life for the benefit of another, if that other induces him to procure the insurance and pays the premiums thereon, or there is any evidence tending to show that the insurance was obtained with a view to avoid or evade the law against speculative insurance Griffin's Adm'r v. Equitable Assurance Society, 84 S. W. 1164, 27 Ky. Law Rep. 313; Brombley v. Washington Life Ins. Co., 92 S. W. 17, 28 Ky. Law Rep. 1300, 5 L. R. A. (N. S.) 747; Beard v. Sharp, 100 Ky. 606, 38 S. W. 1057, 18 Ky. L. R. 1029; New York Life Ins. Co. v. Brown, 66 S. W. 613, 23 Ky. Law Rep. 2070; Baldwin v. Haydon, 70 S. W. 300, 24 Ky. Law Rep. 900; Wrather v. Stacey, 82 S. W. 420, 26 Ky. Law Rep. 683; Lee v. Mutual Life Insurance Company, 82 S. W. 258, 26 Ky. Law Rep. 577; Barbour v. Larue, 106 Ky. 546, 51 S. W. 5, 21 Ky. L. R. 94; Basye v. Adams, 81 Ky. 363, 5 Ky. L. R. 91; Lockett v. Lockett, 80 S. W. 1152, 26 Ky. Law Rep. 300; Scott v. Scott, 77 S. W. 1122, 25 Ky.

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Law Rep. 1356; Adams v. Reed, 38 S. W. 420, 18 Ky. Law Rep. 853, 35 L. R. A. 692; Bramblet v. Hargis, 94 S. W. 20, 29 Ky. Law Rep. 610. Such insurance has a tendency to create a desire to destroy the life of the insured to obtain the insurance, there being no tie of blood, or kindred, or interest, to wish its prolongation; and a person who procures for his benefit insurance upon the life of another, when he is not connected with that life by ties of kindred or dependency, or interested in its continuance from business motives, may be actuated solely by a purpose to derive profit from its destruction, and be rewarded by wagering against the amount payable at his death the sums expected in premiums during his life.

In subdivision 3, art. 4, c. 32, of the Kentucky Statutes of 1903, relating to assessment and co-operative life insurance companies, it is provided, in section 678, that "no corporation doing business under this law shall issue a certificate or policy upon the life of any person more than sixty years of age, nor upon any life in which the beneficiary named has no interest." And, by section 680, an insurance company organized under the laws of any other state for the purpose of furnishing life or accident insurance upon the assessment plan shall not be authorized to do business in this State until it has filed with the commissioner of insurance a certificate showing, among other things, that "its certificates or policies are payable only to beneficiaries having a legal insurable interest in the life of the member or insured." And this court in Supreme Commandery of Golden Cross v. Hughes, 114 Ky. 175, 24 Ky. L. R. 984, 70 S. W. 405, Ancient Order of United Workmen v. Edwards, 85 S. W. 701, 27 Ky. Law Rep. 469, Supreme Lodge of K. P. v. Hunziker, 87 S. W. 1134, 27 Ky. Law Rep. 1201, and

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American Guild v. Wyatt, 100 S. W. 266, 30 Ky. Law Rep. 632, held that section 679 of the subdivision supra applied to fraternal and benevolent associations. Under the authority of these cases we see no escape from the conclusion that sections 678 and 680, supra, also apply to them. This being true, at the time this contract of insurance was made, and when the insured died, it was contrary to the statute for these associations to issue certificates unless the beneficiary named therein had a legal insurable interest in the life of the insured. The Legislature in 1906, by an act which became a law March 24, 1906 (Laws 1906, p. 481, c. 142), exempted from the operation of the subdivision in question "fraternal societies, lodges or councils, which are under the supervision of a grand or supreme body, and securing members through the lodge system exclusively, and paying no commissions, nor employing any agents except in the organization and supervision of the work of local subordinate lodges or councils." So that, hereafter, members in fraternal and benevolent associations such as the Supreme Lodge of the Knights of Honor will not be limited by statute in the designation of beneficiaries to persons who have an insurable interest in their lives; but this statute has no application to the case before us. The rights of the parties must be adjudged by the laws in force at the time the certificate was issued.

The only remaining question is: Did appellees, who were first cousins of the insured, have, in the meaning of the statute, an insurable interest in his life? It will be observed that the statute does not undertake to define "insurable interest," and we are left to ascertain its meaning by our own conceptions of what is the proper definition of the words, guided by the

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opinions of courts of last resort and text-writers dealing with the question. In the widely quoted case of Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924, Mr. Justice Field, speaking for the court, said: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest arising from the relations of the parties obtaining the insurance, either as creditor of, or surety for, the insured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and the child of his parent, a husband in the life of his wife, and the wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously, to protect the life of the insured, than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured." And in Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251, the court said: "It is well settled that a man has an insurable interest in his own life and that of his wife and children, a woman in the life of her husband, and a creditor in the life of his debtor. Indeed, it may be said generally that

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any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life." It has been held a son has an insurable interest in the life of his father. Reserve Mutual Life Ins. Co. v. Kane, 81 Pa. 154, 22 Am. Rep. 741. A father has an insurable interest in the life of his child. Williams v. Wash ington Life Ins. Co., 31 Iowa, 541. Sisters and brothers have an insurable interest in the life of each other. May on Insurance, section 107. A wife has an insurable interest in the life of her husband, and a husband in the life of his wife. Currier v. Continental Life Ins. Co., 57 Vt. 496, 52 Am. Rep. 134; Ky. St. 1903, section 654. A person dependent upon the life of another has an insurable interest in that life. Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38. A granddaughter has not an insurable interest in the life of her grandfather, nor has a nephew, as such, an insurable interest in the life of an aunt, nor a son-in-law an insurable interest in the life of his mother-in-law. May on Insurance, section 107. In Singleton v. St. Louis Ins. Co., 66 Mo. 63, 27 Am. Rep. 321, an uncle was held not to have an insurable interest in the life of his nephew. In Burton v. Conn. Mut. Life Ins. Co., 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405, the court held that a grandchild had no insurable interest in the life of his grandfather. A stepson has no insurable interest in the life of his stepfather, where he has a separate home and family of his own. United Brethren Mutual Aid Society v. McDonald, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 110.

These authorities illustrate the limitations that have been placed on insurable interest, and the extent to which the courts have gone in an effort to prevent

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wagering and speculative contracts of insurance. Although an examination of them will show various reasons for the conclusion reached, it may safely be said that the relationship of creditor and debtor must exist, or that the beneficiary must have or expect some pecuniary relief, benefit, or advantage from the continuance of the life of the insured, or the relationship growing out of ties of blood or marriage must be so close as to justify the well-founded belief that loss or disadvantage would naturally and probably arise to the party in whose favor the policy is written from the death of the person whose life is insured. Generally the courts have endeavored to make insurable interest dependent on the question that pecuniary loss would presumably result to the beneficiary from the death of the insured; but where the relationship, as in the case of husband and wife, parent and child, sister and brother, is so close as to preclude the probability that mercenary motives would induce the sacrifice of life to gain the insurance, the element of pecuniary consideration is not deemed essential to sustain the validity of the policy. But looking at the question from any standpoint, cousins, who are not dependent on or creditors of the insured, cannot fairly be said to have an insurable interest in his life.

Wherefore the judgment is reversed, with directions to enter a judgment giving to appellant the insurance.

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CASE 35.—ACTION BY THE COMMONWEALTH AGAINST THE SOUTHERN PACIFIC COMPANY TO COMPEL THE LISTING OF PROPERTY FOR TAXATION.—November 27.

Commonwealth v. Southern Pacific Co.

Appeal from Jefferson Circuit Court; Common Pleas Branch; First Division.

EMMETT FIELD, Judge.

From a judgment sustaining a demurrer to the Commonwealth's reply to a plea in abatement the Commonwealth appeals—Affirmed.

1. Abatement—Another Action Pending.—Ky. Stats., 1903, section 4241, authorizing a suit to compel the listing of property for taxation, does not contemplate two proceedings by the revenue agent of the State against the tax-payer, involving the same issues and seeking the same relief.
2. Same.—A suit instituted by the revenue agent for the State at large, under Ky. Stats., 1903, section 4241, to compel the listing of property for taxation, does not abate on the death of such officer.
3. Same.—Where two suits are instituted under Ky. Stats., 1903, section 4241, to compel the listing of property for taxation, against the same tax-payer, involving the same issues, and seeking the same relief, the prior suit abates the subsequent one.
4. Taxation—Listing Property—Action to Compel.—A proceeding before the board of tax supervisors by the revenue agent for the State at large to obtain the listing of property for taxation is not the institution of a suit under Ky. Stats., 1903, section 4241, authorizing a suit to compel the listing of property for taxation.
5. Attorney General—Duties—Actions—Listing Property for Taxation.—Ky. Stats., 1903, section 113, declaring that the Attor-

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ney General shall attend in behalf of the Commonwealth to all cases in which it is interested, except where it is made the duty of the county attorney to represent the Commonwealth, and shall institute the proper proceedings to enforce payment of demands due the State, and section 114, declaring that he, with the assistance of the Auditor, shall investigate the condition of all unsatisfied claims due the Commonwealth and take all necessary steps to collect the same, do not authorize the Attorney General to prosecute in conjunction with the revenue agent a suit to compel the listing of property for taxation.

N. B. HAYS, Attorney General, J. H. HAZELRIGG and J. SMITH HAYS for the Commonwealth.

The Commonwealth of Kentucky is interested in causing an assessment of the property belonging to persons subject to be taxed in the State. It is this interest of the Commonwealth that is dominant in the case at bar. It is not a question of penalties to be divided between the agents, or of what agent, if any, is entitled to fees. The Attorney General of the State, using the name of the Commonwealth, appeared before the board of supervisors, also in the county court, and in the circuit court, and appears here, asking that he be permitted to prosecute for the State this action. The appellee interposes a plea in bar to the right of the parties to be heard in this case. That plea in bar depends upon the ability of a real subsisting prosecution on the part of the Commonwealth against the appellee for the same cause at the time of the institution of this suit. No suit was pending by Mr. Alexander on February 4, 1907, when the Attorney General begun his effort to cause the assessment of the appellee's property; and no suit—that is, a subsisting active prosecution—by Mr. Alexander or any other officer authorized to prosecute was in existence on March 14, 1907, when Mr. Hardesty filed this suit in the Jefferson county court. There being, in fact, no active prosecution in existence at either date, it results that the plea in bar should not have been sustained.

Certainly it is not proper that the Commonwealth should be permitted to prosecute two suits upon the same state of facts against the appellee, for this would not be fair to it; but the Commonwealth asks that the appellee be required to answer in the suit which it elects to prosecute, not in the suit that appellee would prefer that it prosecute. This the courts of the State ought to authorize the Commonwealth to do.

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HUMPHREY & HUMPHREY and PRESTON DAVIE for appellee.

SUMMARY.

1. Where, as here, two similar proceedings have been begun by revenue agents for the assessment of omitted property, the taxpayer is entitled to have one of them abated. (Riedel v. Comth., 28 Ky. Law Rep., 898; Comth. v. Bacon, 31 Ky. Law Rep., 472; Lucas v. Comth., 28 Ky. Law Rep., 372.)

2. A proceeding by a revenue agent to assess omitted property is not abated by the death of that officer. (Ency. of Pl. & Prac., vol. 17, p. 171; Cyc., vol. 1, p. 119; Thompson v. United States, 103 U. S., 480; Lindsey v. Auditor of Kentucky, 3 Bush, 233; Clark v. McKenzie, 7 Bush, 31; Hendricks v. Posey, 20 Ky. Law Rep., 364; Sebree v. Comth., 115 Ky., 736.)

3. In proceedings by revenue agents to assess omitted property the Commonwealth is the principal and not the revenue agent. (Sebree v. Comth., 115 Ky., 736; Comth. v. Bacon, 31 Ky. Law Rep., 472.)

Therefore, in the present proceedings, since it is admitted by the pleadings that the jurisdiction is the same, the issues are the same and the relief sought is the same, the appellee is entitled to have one of each of the present sets of actions abated.

4. The rule here and elsewhere is that the prior action when pleaded abates the subsequent one, and a subsequent one can not be pleaded to abate a prior one. (Ency. of Pl. & Prac., vol. 1, p. 752; Century Digest, vol. 1, p. 33; Renner & Bussard v. Marshall, 1 Wheaton, 215; Phillips v. Southern Division, C. & O. Ry. Co., etc., 110 Ky., 23; Loveland-Garrett Co. v. Day (1907), 30 Ky. Law Rep., 879; Lucas v. Comth., 28 Ky. Law Rep., 372.)

5. A hearing before the board of supervisors of Jefferson county does not commence an action of a revenue agent to assess omitted property, because

(a) Both "actions" and "special proceedings" and "civil cases" under the Code, and must be before a judicial body. (Civil Code, sections 1, 2 and 3; Am. & Eng. Ency. of Law, vol. 26, p. 1; Cyc., vol. 7, p. 153; Schultz's Lessee v. Moore (Ohio), Wright, 280; Prince v. McCarthy, 61 Wis. 3, 20 N. W. 655.)

(b) A board of supervisors is not a judicial body, and the act of assessing property is a purely ministerial act, totally unconnected with the present proceeding. (Muir's Admr. v. City of Bardstown, 27 Ky. Law Rep., 1150.)

(c) The proceeding by a revenue agent to assess omitted prop-

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erty, as before shown, is a "special proceeding" and as such is an "action" within the meaning of the Code. (Code, section 732, number 34.)

(d) An action is commenced by filing a petition with the clerk of the proper court. (Code, section 39.)

(e) A special proceeding of the present character is commenced by filing a statement with the county clerk. (Lucas v. Comth., 28 Ky. Law Rep., 372, and cases cited; Riedel v. Comth., 26 Ky. Law Rep., 848.)

Therefore, since the pleadings admit that the statements in the present proceedings were filed with the county clerk subsequently to those of Mr. Alexander, they are the ones properly abated.

6. The Act of Revenue and Taxation is not in conflict with the Constitution, or other statutes, and does not curtail any of the rights given the Attorney General. (Constitution, section 91; Ky. Stats., sections 113, 114; Denny v. Coulter, 23 Ky. Law Rep., 1619; Act of Revenue and Taxation, Acts 1906, p. 227; Ky. Stats., sections 145, 4169, 4170.)

7. Under the Act of Revenue and Taxation the Attorney General has no right to direct or interfere with the revenue agent's proceedings to have omitted property assessed. (Denny v. Coulter, 23 Ky. Law Rep., 1619.)

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

On March 14, 1907, appellant, D. L. Hardesty, revenue agent for the State at large, and its Attorney General, filed in the Jefferson county court a statement alleging that appellee was the owner of more than $300,000,000 worth of personal property, consisting of stocks, bonds, and securities in various corporations, companies, and associations, on September 1, 1906, that had not been listed for taxation for the year 1907, by any of the officers charged with that duty; that appellee was a domestic corporation, with its home office and place of business in Jefferson county, Ky. A list of the property was filed with the statement. On April 1, 1907, appellee moved the court to require appellant to elect whether it would prosecute this suit or the one instituted by George

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H. Alexander, revenue agent for the State at large, to compel the listing of appellee's property for the same year, for the same amount, with which action a similar list of appellee's property was filed. The court overruled this motion and refused to require appellants to elect. Appellee then filed a plea in abatement, which reads as follows: "The defendant, the Southern Pacific Company, says that the plaintiff ought not to be allowed to prosecute this suit, because on February 7, 1907, and prior to the bringing of this suit, the plaintiff, the Commonwealth of Kentucky, by George H. Alexander, filed a statement against the defendant for the same matter concerning which the present statement is filed, and that the said proceeding by the said George H. Alexander is still pending and undetermined, and defendant pleads the same in abatement of the present suit." Appellant filed a general demurrer to this plea, which was overruled; and it then filed a reply to the plea in abatement, which is as follows: "The plaintiff, for reply to the plea in abatement and in avoidance of same, says that George H. Alexander, revenue agent for the State at large, who instituted the action No. 2,451 on February 7, 1907, died on February 12, 1907, and said action was as to him abated; that his power as revenue agent for the State at large ceased on said date. Plaintiff says that on March 14, 1907, and before any other revenue agent for the State at large, or for the county of Jefferson, had instituted any proceeding in this court, D. L. Hardesty, who is relator in this action, instituted this proceeding." To this reply appellee filed a demurrer, which was sustained by the court, adjudging that this action be abated and dismissed, to which ruling appellant excepted and prayed an appeal to this court.

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It is the contention of the Commonwealth under the facts recited, that the suit of the Commonwealth by George H. Alexander, revenue agent for the State at large, mentioned in the plea of abatement, was not pending, and had not been since the death of George H. Alexander, February 12, 1907; that Alexander was a public officer of the Commonwealth, and that at his death the office of revenue agent, which he had filled, became vacant, and the suit at his death was abated; and therefore Revenue Agent Hardesty had the right to institute and prosecute this action. This court has repeatedly decided that no rule, which would tend to harass the taxpayer with two proceedings against him for the same thing, should be upheld. It was not contemplated by section 4241, Ky. St. 1903, that the taxpayer should be put to the trouble of defending two proceedings for the same thing. See Riedel v. Commonwealth, 82 S. W. 635, 26 Ky. Law Rep. 898. It is conceded by the representatives of the Commonwealth that, if the action instituted by Alexander as revenue agent for the State at large was pending after his death and did not abate by his death, then there were two actions in existence against appellee for the same thing. It is clear that the death of Alexander did not abate the suit instituted by him. In the case of Commonwealth v. Bacon, 102 S. W. 839, 31 Ky. Law Rep. 472, this court said: "The proceeding under section 4241 is a proceeding by the Commonwealth. The revenue agent is only the officer authorized to institute the proceeding. It is the Commonwealth's suit." To the same effect are the cases of Hendrick v. Posey, 45 S. W. 702, 20 Ky. Law Rep. 359, and Sebree v. Commonwealth, 115 Ky. 736, 74 S. W. 716, 25 Ky. L. R. 121. These authorities sustain the proposition that the death of Alexan-

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der did not abate the action instituted by him, and it was pending at the time the order of abatement was made in this action. As stated, it is agreed that the same issues were involved and the same relief sought in both actions, and, as appellee should not be harassed with two actions for the same thing, it was entitled to have one of the actions abated.

Appellant claims that the first should have been abated. The law is that the last action brought should be abated. It is priority, and not the mere pendency of a suit, that abates a second. The pendency of a suit subsequently instituted cannot be pleaded either in abatement or in bar to a prior suit between the same parties for the same cause of action. See 1 Ency. of Pleading & Practice, 752; Phillips v. Southern Division C. & O. R. R. Co., 110 Ky. 33, 22 Ky. Law Rep. 1530, 60 S. W. 951; Lucas v. Comth,, 89 S. W. 292, 28 Ky. Law Rep. 372 and Butler, sheriff v. Watkin's Ex'rs, 27 S. W. 995, 16 Ky. Law Rep. 302. In this last case the auditor's agent filed a statement on June 12, 1891, on which process was issued on June 18, 1891. The sheriff listed the property on June 17, 1891, and filed his list with the county court clerk. It was held that the proceedings by the auditor's agent took precedence of the sheriff's proceedings. It is claimed by counsel for appellant that they were before the board of tax supervisors, endeavoring to get the property of appellee listed for taxation, when Alexander instituted his proceeding of February 7, and by reason of this fact the court should determine that this proceeding instituted by Hardesty should be upheld as having priority over the Alexander suit. The proceeding by the representatives of the Commonwealth before the board of tax supervisors was not the institution of an action

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or proceeding under section 4241, as appears from the authorities cited above.

The remaining question to be determined is the claim of appellant's counsel that under sections 113, 114, 145, 4169, and 4170 of the Statutes, the Attorney General has the power to select which revenue agent shall prosecute an action to assess omitted property, and to prosecute it in conjunction with him. The Attorney General is an officer whose election is provided for by the Constitution; and it is provided by section 91 of the Constitution that his duties shall be such as may be prescribed by law; therefore his duties are such as are provided by the Legislature This precise question was considered and determined in the case of Coulter v. Denny, 67 S. W. 65, 23 Ky. Law Rep. 1619, in which the court said: "As it was the duty of the auditor's agent to institute the proceeding against Cecil, and the duty of the county attorney of that county to have prosecuted it, it follows that it was not the duty of the Attorney General under section 113 to represent the Commonwealth in the Boyle county court, nor was it one of the actions which he was authorized to institute and employ an attorney to assist in its prosecution under section 114." In that case this court considered and construed all the sections referred to by appellant, except sections 145, 4169, and 4170. These sections have no application to the question herein involved. Section 145 provides for prosecutions by the Attorney General, upon information of the Auditor, of all public officers or public debtors who fail to render their accounts at the proper time, or pay the amounts in their hands due the Commonwealth into the treasury. Section 4169 provides for the institution of actions by the Auditor, to be prosecuted by the Attorney General,

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for the purpose of subjecting the equitable estates of delinquents to the payment of judgments against them in favor of the Commonwealth, when there has been a return of "No property found" on an execution to enforce the judgment. Section 4170 provides for a penalty of 20 per cent. in the event a recovery is had against a delinquent in an equitable action under section 4169. It is obvious that the present proceeding to compel the assessment for taxation of omitted property is not required of the Attorney General under the statutes referred to. The Legislature has not imposed this duty upon him; but he should be commended for giving advice and aid in the prosecution of such actions, as well as all other actions in which the Commonwealth is interested, even though it is not required of him by express statute.

For these reasons, the judgment of the lower court is affirmed.

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CASE 33.—ACTION BY S. I. ARMSTRONG AGAINST THE LOUISVILLE & NASHVILLE R. R. CO., FOR DAMAGES FOR PERSONAL INJURIES.—November 27.

Louisville & N. R. R. Co. v. Armstrong

Appeal from Boyle Circuit Court.

W. C. BELL, Circuit Judge.

Judgment for plaintiff, defendant appeals—Reversed.

1. Railroads—Frightening Animals—Injuries—Estoppel—Plea.—In an action for injuries to plaintiff by his team becoming frightened at the carcass of a horse lying on defendant railroad company's right of way, near a public road crossing, a plea of estoppel alleging that plaintiff, though aware of the presence of the carcass on or near the highway and within the corporate limits of a town, failed for several hours prior to the accident to make it known to the town authorities or request its removal, was demurrable, as the facts did not constitute an estoppel, but were provable to establish assumed risk.
2. Same—Negligence—Petition.—A petition for injuries to plaintiff by his team becoming frightened at the carcass of a horse lying on defendant railroad company's right of way near a public crossing in a town was fatally defective, where it failed to allege that defendant knew of the presence of the carcass on defendant's right of way, or that the carcass had remained there an unreasonable length of time, or long enough for defendant to have removed it before plaintiff was injured.
3. Same—Notice.—Where a petition for injuries to plaintiff by his horses becoming frightened by the carcass of a horse on defendant's right of way near a road crossing, alleged that the horse was killed by one of defendant's trains, such allegation was not a sufficient statement that defendant's

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employes knew that the horse was struck, or that it died from the effects of the collision.

4. Pleading—Defects—Cure by Answer.—Where a petition for injuries to plaintiff by his horses becoming frightened at the carcass of a horse lying on defendant railroad's right of way was defective for failure to charge that defendant knew of the presence of the carcass, or that it had remained there an unreasonable time, or long enough for defendant to have removed it, such defect was not cured by an answer containing only a traverse and a plea of contributory negligence.

5. Railroads — Crossing Accident — Proximate Cause. — Where plaintiff's horses were frightened at the carcass of a horse lying on defendant railroad company's right of way near a road, the killing of the horse by one of defendant's trains was not the proximate cause of plaintiff's injuries resulting from the fright of his team.

6. Same—Care Required.—Where plaintiff was injured by his horses becoming frightened at the carcass of a horse lying on defendant's right of way near a highway, plaintiff, in order to recover, was required to prove that the carcass was on defendant's right of way in close proximity to the highway, and that defendant knew, or by the use of ordinary care could have known, of its presence within such time as would reasonably have enabled it to have removed the carcass before plaintiff received his injuries.

7. Same—Notice—Negligence.—Where the fact that a horse had been killed and was lying on defendant railroad company's right of way near a road was not communicated to any employe of the railroad company until less than an hour before plaintiff was injured by his horses becoming frightened at such object, which was removed by defendant's section foreman within two hours thereafter, the removal was made within a reasonable time after notice.

8. Same.—Where it was not shown that a horse alleged to have been killed by one of defendant's trains was lying wholly on defendant's right of way near a highway, or that its situation was such as to make it apparent to train operatives that it was an obstruction requiring removal because of its proximity to the crossing, or that it was part of the duty of train operatives to inspect dead stock on the right of way and communicate the facts to other agents of the company, the fact that the crews of two or more freight trains and a passenger train passed the carcass during the morning before its removal and before plaintiff was injured by his horses

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becoming frightened at the same, was insufficient to charge defendant with notice of its presence.

9. Same—Contributory Negligence.—Where plaintiff and his companion, though their horses were badly frightened at the carcass of a horse killed by a train and lying on the railroad right of way near the highway, compelled them to pass, and, on returning with a load, or whipped the horses in order to induce them to pass, whereupon they backed the wagon off a fill and caused palintiff's injuries, plaintiff was negligent as a matter of law, and could not recover.

10. Negligence—Driver of Vehicle—Imputed Negligence.—Where plaintiff and his companion were engaged in hauling fodder with a team, and plaintiff was injured while his companion was endeavoring to force the horses past the carcass of a horse on defendant railroad company's right of way near a highway, at which the horses were frightened, the relation of master and servant, or joint undertakers, existed between plaintiff and his companion, so that plaintiff was chargeable with the negligence of the latter.

CHARLES R. McDOWELL for appellant.

BENJAMIN D. WARFIELD and CHENAULT HUGELY of counsel.

We ask a reversal of this case for the following reasons:

First, that the court erred in sustaining a demurrer to the third paragraph of the defendant's answer.

Second, that the court erred in overruling the defendant's demurrer to plaintiff's petition and petition as amended.

Third, that the court erred in overruling defendant's motion for a peremptory instruction, (1) because there was no proof that the dead animal was on the highway or right of way of the road an unreasonable length of time; (2) because there was no proof that it remained an unreasonable length of time after notice to the defendant; (3) because there was no notice to defendant until after the accident happened, and the attempts to prove notice, and the irrelevant testimony admitted by the court below thereunder, were all highly prejudicial to the defendant; (4) because appellee's negligence was so great in casting himself upon the obstruction after notice that it existed, as to preclude any recovery, and to make him guilty of contributory negligence as a matter of law.

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AUTHORITIES CITED.

Knaur v. City of Louisville, 20 Ky. Law Rep. 193, 41 L. R. A. 219; Ky. Stats., section, 3709; 4 Paige, 126; 1 Rorer, Railroads, 669; Beach on Contributory Negligence, section 9; 24 Wis., 157; Haselrigg v. City of Frankfort, 92 S. W., 584; 2 Hill, 451; City of Danville v. Robinson, 39 S. E. 122 (Va.); 4 Md., 231; J. T. & K. W. R. Co. v. Pen. L. Trans. & Mfg. Co., 17 L. R. A., 63; 6 Ga., 44; Story, Agency, section 140; 13 Ves., Jr., 114; 1 Parson's Cont., 77; Thompson's Comm. Negligence, vol. 5, section 6242; Bell v. Henderson, 24 Ky. Law Rep., 2434; Elliot, Roads and Streets, section 636; Pittsburg Sou. R. Co. v. Taylor, 104 Pa. St., 306; Bishop, Non-Contract Law, sections 1012-13; City of Danville v. Robinson, 39 S. E., 122.

JOHN R. VORIS for appellee.

ROBERT HARDING and JOHN W RAWLINGS of counsel.

We contend that the petition unquestionably sets forth a cause of action against appellant for damages for the injuries received, and that the proof clearly shows that such injuries were received by him as the direct result of the negligence of the railroad company in creating and permitting this nuisance at this place; that this dead horse was an object, "the obvious tendency of which was to frighten ordinarily gentle horses;" that the company knew, or, by the exercise of ordinary care, could have known, of its existence there in time to have removed it and prevented the injury to appellee; that it negligently failed to do so; that the negligence, if any, of the driver Lewis, can not be imputed to appellee, or if so, that neither he nor appellee was guilty of such negligence at the time as to preclude appellee's recovering for the injuries received; that all questions of fact were submitted to the jury under instruction far more favorable to appellant than it was entitled to, instruction No. 4 being especially erroneous and highly prejudicial to appellee, and that the injuries received justified, in fact, a much larger verdict than that given by the jury, and the jury, the lawful triers of the facts, having, under such instructions, found for appellee, we respectfully insist that this court should, and ask that it do, affirm the judgment of the lower court.

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AUTHORITIES CITED.

Knauer v. City of Louisville, 45 S. W., 510; L. & N. R. Co v. Wade, 11 Ky. Law Rep., 904; 2 Thomp. Neg., sections 1916, 1918; Baxter v. Chicago, R. I. & T. Ry. Co., 87 Iowa 488, 54 N. W. Rep. 450; Morse v. Town of Richmond, 98 Am. Dec., 600; Cahill v. Cin., etc., Ry. Co., 92 Ky., 345; Little v. Hackett, 116 U. S. Rep., 366; Sluder v. St. Louis Co., 88 S. W., 648; 5 Thomp. Neg., sections 6255, 6245, 6263, 6266; Duvall v. Atl. Coast Line R. R. Co., 101 Am. St. Rep., 880; N. Y., Lake Erie, etc., Ry. Co. v. Steinbrenner, 54 Am. Rep., 126; Robinson v. The N. Y. C., etc., R. R. Co., 23 Am. Rep., 1; Masterson v. N. Y., etc., R. R. Co., 38 Am. Rep., 510; Carlisle v. Brisbane, 57 Am. Rep., 483; City of Louisville v. Brewer's Admr., 72 S. W., 9; City of Maysville v. Gulfoyle, 62 S. W., 493; City of Brownsville v. Arbuckle, 99 S. W., 339; City of Carlisle v. Secrest, 75 S. W. 268, 25 Ky. Law Rep. 336; City of Lancaster v. Walter, 80 S. W. 189, 25 Ky. Law Rep. 2189; Modern Law of Municipal Corporations, section 1282.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

The appellant, Louisville & Nashville Railroad Company, seeks the reversal of a judgment of the Boyle circuit court entered against it upon a verdict awarding appellee, S. L. Armstrong, $1,000 damages for injuries claimed to have been caused by its alleged negligence in suffering a dead horse to lie and remain upon its right of way near a public road crossing its track at Junction City, at which a pair of horses, driven to a wagon by appellee and John Lewis, became so frightened as to overturn the wagon on an embankment and violently throw the former to the ground, thereby producing the injuries complained of, which are of a serious and probably permanent character. It was alleged in the petition and amended petition that the horse, at whose carcass those driven by appellee and Lewis became frightened, was struck and killed by one of appellant's

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trains, and thereby thrown "upon said defendant's right of way at and near to and along the edge of said public road, street, and highway, * * * and the defendant negligently and carelessly suffered and permitted said dead horse to be and remain at said point, and the same was calculated to and did alarm and frighten horses being driven and ridden over said roadway by the public," that the dead horse "was a frightful looking object," and did frighten the two horses driven by himself and Lewis, causing them to back the wagon off a fill and turn it over, thereby inflicting the injuries complained of, and that the two horses were "gentle and kind horses" at the time of the accident. Appellant filed a demurrer to the petition, which was overruled, and to this ruling it reserved an exception, following which it filed an answer containing three grounds of defense; the first paragraph containing a traverse, the second a plea of contributory negligence, and the third a plea of estoppel based upon the alleged facts that the dead horse was lying upon the public highway and within the limits of Junction City, which is an incorporated town of the sixth class, possessed of such officers as are provided for such towns, and that appellee, though aware of the presence of the dead horse on or near the public highway and within the corporate limits of the town, several hours before the accident resulting in his injuries, failed to make it known to the town authorities or request its removal. The lower court sustained a demurrer to the third paragraph of the answer, and the affirmative matter of the first and second paragraphs was denied by reply.

We think the demurrer to the third paragraph of the answer was properly sustained, for what was pleaded therein did not constitute an estoppel, but

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could have been and was introduced on the trial as evidence conducing to prove appellee's knowledge of the presence of the dead animal at the place of the accident several hours before its occurrence, and that with such knowledge he took the risk of driving by the dead horse, instead of requesting of appellant or the authorities of Junction City its removal. We are further of opinion that the court erred in overruling appellant's demurrer to the petition. The petition does not manifest a cause of action, for it neither alleges that appellant knew of the presence of the dead horse upon its right of way, or that it remained there an unreasonable length of time, or long enough for appellant to have removed it before appellee was injured. It is true it is therein alleged, in substance, that the horse was killed by one of appellant's trains; but, conceding this to be true, it does not necessarily follow that those in charge of the train knew it struck the horse, or that it died from the effects of the collision. The collision doubtless occurred at night, or before daylight in the morning, and it may be that neither the engineer nor fireman saw or realized it, and the fact that the horse was knocked from the track, instead of being run over by the train, would seem to indicate that little, if any, jar to the engine resulted from the collision. As what was left of appellant's answer, after the third paragraph went out on demurrer, contains only a traverse and plea of contributory negligence, it cannot be said to have cured the defects of the petition.

The killing of the horse by one of appellant's trains could not have been the proximate cause of appellee's injuries; but if, after killing the horse, appellant knowingly permitted it to remain upon its right of way for an unreasonable length of time, and it was

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so near the public road as to frighten the horses of persons driving or riding upon the public road, the dead animal would, in that event, unquestionably become a nuisance; and this would also be true if the horse were to die upon appellant's right of way from natural causes, instead of being killed by the train. "A railroad company is no more privileged than a natural person is to deposit or leave something on or near the public highway which is very unusual, and the obvious tendency of which is to frighten ordinarily gentle horses, especially where it is not necessary for the proper operation of the railroad to do so. For example, a railway company was held liable for personal injuries suffered by one who was thrown from a wagon because the horse became frightened at the dead body of a steer negligently removed by railway employes from the railway track, where it was killed, to the side of the highway, where it would not be seen by horses until they had nearly reached it." Thompson on Negligence, vol. 2, section 1916; L. & N. R. R. Co. v. Wade, 89 Ky. 255, 11 Ky. Law Rep. 436, 12 S. W. 279. It is apparent, therefore, that, in order to recover of appellant for the injuries he sustained, it was incumbent upon appellee to prove that the dead horse in question was upon its right of way in close proximity to the public road, and that it knew, or by the use of ordinary care could have known, of the presence of the animal there within such time as would reasonably have enabled it to remove the carcass before appellee received his injuries, and, moreover, that appellee's injuries did not result from his own failure to use ordinary care. In the case of Hazelrigg v. Board of Council of the City of Frankfort (Ky.) 92 S. W. 584, 29 Ky. Law Rep. 207, which was an action to recover for injuries resulting to

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the occupant of a buggy from an obstruction in the street, it is said: "In order to render the city liable, it must be shown that it, by the exercise of ordinary care, could have known of the existence of the obstruction in the street and removed the danger. We cannot say that it is actionable negligence for the city to fail to discover in three hours an obstruction in one of its streets, caused by a lot of rock screenings being dumped there. There is no evidence that the city knew of the obstruction, and the bare fact that it had been there for three hours is not sufficient to charge it with liability." In the case at bar no witness saw the horse struck by one of appellant's trains; but, judging from the wounds upon it, we think it fairly inferable that such was the manner of its death. It is, however, certain from the evidence that his dead body was first discovered early on the morning of November 18, 1906, so his death must have occurred before daylight.

It also appears from the evidence that appellant's servants, intrusted with the work of maintaining the section of its railroad track embracing the place where the dead horse was found, reside a mile and a half east of that point, and that they were at work that day, beginning at an early hour of the morning, east of where they reside. Therefore they were not at or near the place where the horse was found on the morning of that day. The horse was seen by appellee and Lewis at 6:30 or 7 o'clock that morning, as they drove from Junction City out to a farm for a load of fodder belonging to the former. The horses attached to their wagon were then afraid of the dead horse, and were with difficulty driven by it. Although appellee and Lewis, after leaving the place where the dead horse was found, passed near the place of resi-

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dence of some of the town authorities, they did not mention to them, or any one, that there was a dead horse near the crossing, and according to the entire evidence that fact was never communicated to any employe of appellant until 10:30 o'clock on the morning of the day appellee was injured, which was less than an hour prior to the accident; the station agent at Junction City being then informed of it by one McDonald. Upon receiving the information, the station agent immediately notified appellant's section foreman of it, and the latter by 12 o'clock, which was as soon as he could reach the place with his force, removed the dead animal. Appellee was allowed to prove that two or more freight trains and a passenger train passed the dead horse during the morning and before its removal, from which it is argued that the crews of these trains saw, or ought to have seen, the horse, which was a sufficient notice to appellant. We do not accept this view. It does not clearly appear from the evidence that the horse was wholly on appellant's right of way, or that its situation was such as to make it apparent to those in charge of the trains that it was such an obstruction as required removal on account of its proximity to the crossing. It was not made to appear from the evidence that it was the duty of those in charge of passing trains to stop them to inspect such dead stock as might be seen on appellant's right of way, or to communicate to station or other agents of appellant such facts; but it was shown by the evidence that it is the duty of the section foreman, upon being notified of the presence of dead stock on appellant's right of way, to remove it, and this duty with respect to the horse in question was performed by the section foreman within a reasonable time after notice of its presence on the right of way

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was received from the station agent, who, as before said, communicated it promptly after the fact was made known to him.

With respect to appellee's conduct on the occasion of receiving his injuries, it may be said that the evidence showed him to be guilty of contributory negligence. He had seen the dead horse three or four hours before he was injured. In then approaching it the horses behind which he was riding were frightened and had to be forced to pass it, and when he returned with the load of fodder upon the wagon the dead horse was where it was when he had last seen it, and could be seen by appellee and Lewis several hundred yards before reaching it. In fact both admit that they saw the horse some distance before getting to it, yet under the circumstances they determined to remain upon the wagon and force the horses to pass the frightful object. In the effort to do so the horses became badly frightened and refused to proceed, whereupon Lewis commenced to whip them, which increased their fright and caused them to back the wagon off the fill, overturn it, and cause appellee's injuries. In the language of one of the law books, one cannot "cast himself" upon a plainly visible, and to him well known and dangerous, obstruction in or near the highway, though placed or allowed to remain there by the fault of another, and, if injured thereby, be allowed to recover. Such a danger as confronted appellee was not akin to dangerous defects or obstructions in a street or highway, which, though visible at times, are liable to be overlooked or forgotten by the passing pedestrian or traveler; but it was a plainly discernible obstruction, and danger prominently visible, the presence of which, as well as the fact that the horses were afraid of it, was well known

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to him. In attempting to drive by it in the manner adopted, he and Lewis must be presumed to have understood the risk they ran and the probable consequences. These facts being admitted, the court should have decided as a matter of law that the presence of the dead horse on appellant's right of way was not the proximate cause of appellee's injuries, but that they were caused by his own negligence. Although Lewis was the driver, it is, we think, reasonably plain from the evidence that he either sustained the relation of servant to appellee, or they were joint undertakers, in the enterprise of handling fodder, and the negligence of either should be imputed to the other.

In our view of the case a peremptory instruction in favor of appellant should have been given, because the petition failed to state a cause of action, the evidence failed to show that appellant knew, or by the use of ordinary care could have known, of the presence of the horse on its right of way in time to have removed it before appellant was injured, and, finally, it was patent from the evidence that appellee's injuries were caused by his own negligence. This conclusion makes it unnecessary for us to consider the instructions given.

For the reasons indicated, the judgment is reversed for a new trial, and for further proceedings consistent with the opinion.

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CASE 34.—ACTION BY GREEN COUNTY AGAINST A. W. HOWARD TO SURCHARGE HIS SETTLEMENT AS TAX COLLECTOR.—November 2.

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Green County v. Howard

Appeal from Green Circuit Court.

I. H. THURMAN, Circuit Judge.

From a judgment sustaining defendant's demurrer to the petition plaintiff appeals—Reversed.

1. Judgment—Matters Concluded.—Ky. Stats., 1903, section 4146, provides that the report of a tax collector's settlement for taxes collected due a county shall be subject to exceptions by the sheriff or county attorney, and that an appeal may be prosecuted by either party from the judgment on such settlement. Held, That the rulings of the court, unappealed from, on exceptions to such a settlement, are conclusive on both parties, but not as to mistakes which were not discovered when the exceptions were filed, and these matters may be presented by any party in interest by a direct action to surcharge the settlement.
2. Limitation of Actions—Relief from Fraud or Mistake—Tax Collectors—Settlement.—An action to surchage the settlement of a tax collector is an action for relief from fraud or mistake, under Ky. Stats., 1903, section 2519, requiring such actions to be brought within five years after the mistake has been discovered, or after it might have been discovered by ordinary diligence.
3. Same—Accrual of Right of Action.—The right of action to surcharge a tax collector's settlement does not accrue until the settlement has been confirmed.
4. Same—Necessity of Pleading—Presentation by Demurrer.—In an action to surcharge a tax collector's settlement, the defense of limitations must be pleaded, and can not be presented by a demurrer to the petition.
5. Same—Reply—Sufficiency.—Where, in an action to surcharge

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a tax collector's settlement, the defendant pleads limitations in defense, a reply which does not show facts sufficient to avoid the plea is demurrable.

6. Same—Burden of Proof—Allegations in Pleading.—Where, in an action to surcharge a tax collector's settlement, the reply avoids the plea of limitations by showing that the fraud or mistake on which the action is based was not discovered within the period of limitations, and could not by ordinary diligence have been discovered within that time, the burden of proof as to such allegations, where they are denied, is on the person alleging them.

7. Same—Avoiding Bar—Sufficiency.—In an action to surcharge a tax collector's settlement, allegations, to avoid the bar of limitations, that plaintiff could not by ordinary diligence have learned of the mistakes on which the action was based before the statutory bar had attached, were insufficient to avoid such bar, where the alleged mistakes were matters of record; the records being in the county clerk's office, and the settlement having been made in the county court.

8. Counties—Officers—Tax Collectors—Compensation—Statutes. —Ky. Stats., 1903, section 1884, provides that the officer collecting the county levy shall be allowed the same compensation as officers collecting the State revenue. Section 4148 provides that a commission of 10 per cent. upon the first $5,000 and 4 per cent. upon the residue shall be allowed by the county auditor. Held, That all the taxes levied by a county in one year constituted one fund, and were to be taken in the aggregate in computing the commission due the collecting officer, on which aggregate sum he was entitled to a commission of 10 per cent. on the first $5,000 and 4 per cent. on the remainder.

NOGGLE & GRAHAM and W. G. HOWELL for appellant.

POINTS DISCUSSED AND AUTHORITIES CITED.

1. Statement of the case.

2. All the taxes levied by a county constitute only one fund, and are to be taken in the aggregate in computing the commission due the collecting officer. He is only entitled to 10 per cent. commission on the first $5,000 of taxes collected and 4 per cent. on the residue. (Pendleton County v. McMillan, 104 Ky. 816, 20 Ky. Law Rep. 1017, 48 S. W. 154; Montgomery County v. Chenault, 20 Ky. Law Rep. 704, 47 S. W. 457; Pence's Admr. v. Nelson County, 107 Ky. 66, 21 Ky. Law Rep. 500, 53 S. W. 25;

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Little v. Strow, etc., 112 Ky. 527; 23 Ky. Law Rep. 1829, 66 S. W. 282.)

3. The settlements of a tax collector may be surcharged and corrected in an equitable action brought for that purpose. (Ky. Stats., section 4146; Comth., etc., v. McClure, 20 Ky. Law Rep. 1568, 49 S. W. 789; Comth., etc., v. Pate, 27 Ky. Law Rep. 623, 85 S. W. 1096; Bates v. Knott County, 24 Ky. Law Rep. 73, 67 S. W. 1006; Pulaski County v. Watson, etc., 106 Ky. 500, 21 Ky. Law Rep. 61, 50 S. W. 861; Fidelity & Deposit Co. v. Logan County, 27 Ky. Law Rep. 66, 84 S. W. 341; Little v. Strow, etc., 112 Ky. 527, 23 Ky. Law Rep. 1829, 66 S. W. 282.)

JEFF HENRY for appellee.

POINTS AND AUTHORITIES.

1. A settlement with the tax collector in a proceeding under section 4146 is res judicata and is binding on the county. (Pulaski County v. Watson, 21 Ky. Law Rep., 61; Fidelity & Deposit Co. of Md. v. Logan County, 84 S. W., 340.)

2. In limitations to actions for mistake the statute runs from discovery or from such times as, by the exercise of ordinary diligence the mistake ought to have been discovered. (Grundy's Heirs v. Grundy, etc., 12 Ben. Mon., 270; Wood v. James, 87 Ky. 511, 91 Ky. 639, 21 Ky. Law Rep. 394.)

3. The recording of an instrument is a circumstance which is proper to consider in determining when the discovery might be made. (83 Ky., 78.)

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

On January 3, 1898, the office of sheriff in Green County being vacant, A. W. Howard was duly appointed tax collector to collect the county levy for that year. He qualified and gave bond, and entered upon the discharge of his duties. On October 4, 1898, a commissioner was appointed by the fiscal court to settle his accounts. The settlement was made. Exceptions were filed by the county attorney, which were heard by the court. The settlement was corrected,

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approved, and confirmed by the Green county court and properly recorded. On January 29, 1900, Howard was again duly appointed and qualified as tax collector of the county levy for that year, and on October 2, 1900, a commissioner was appointed by the fiscal court to settle his accounts. The settlement was made April 2, 1901, and was approved on May 13, 1901, and ordered to record. This suit was brought on March 3, 1906, to surcharge these settlements. It was alleged in the petition that in the settlement for 1898 Howard was charged with the valuation of the property as fixed by the assessor, but that the state board of equalization had raised the assessment of the property, and that this fact was overlooked in the making of the settlement. In consequence, he was not charged with the full valuation of the property, which made a difference in the taxes of $293.30. It was also charged that, by mistake, he was not charged with the correct number of polls, the difference amounting to $352.50, and that an item of back taxes collected by him had not been charged to him at the correct amount, making in all $629.26, which by mistake was not charged to him in the settlement. It was alleged that this mistake was not discovered until December 13, 1905, and could not have been discovered before by the exercise of reasonable diligence. Similar allegations were made as to the settlement for the year 1900. The defendant demurred to the petition. His demurrer was sustained, and the county appeals.

Section 4146, Ky. St. 1903, is as follows: "Each sheriff shall, when required by the fiscal court, settle his accounts of county or district taxes; and at the regular October term of each year the fiscal court shall appoint some competent person to settle the accounts of the sheriff of money due the county or

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district. The report of such settlement shall be filed in the county clerk's office, and be subject to exceptions by the sheriff or county attorney, who shall represent the Commonwealth and the county, and the county court shall try and determine such exceptions. An appeal may be prosecuted by either party from the judgment of the county court on such settlement, in the same manner as provided by law for appeals from judgments of the quarterly court, except that the county attorney should not be required to give an appeal bond, or actions may be instituted in any court of competent jurisdiction to correct the settlement; and the settlement, when approved shall be recorded in the county clerk's office." Construing this statute in Little v. Strow, 112 Ky. 531, 23 Ky. Law Rep. 1829, 66 S. W. 283, we said: "Under this statute, nobody can file exceptions to the settlements made by the sheriff except the sheriff or the county attorney; but the statute provides that even if the county attorney shall file such exceptions, and they are heard and determined in the county court, he may appeal from the judgment to the circuit court, or actions may be instituted in any court of competent jurisdiction to correct the settlement by any party in interest." Again in Commonwealth v. Pate, 85 S. W. 1097, 27 Ky. Law Rep. 624, we said: "It is true, as contended for by appellee, the county is barred from maintaining an action to surcharge the settlement after five years from the time when the mistake could have been discovered by the exercise of ordinary diligence; and it may be further conceded as true that, if it appeared in the case that five years had elapsed after the settlement and before this action was instituted, it would be necessary for the plaintiff, if limitation is pleaded, to allege and prove, if controverted, that the mistake

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could not have been discovered by the exercise of reasonable diligence within five years next before the institution of the action. No action accrued to the county until the settlement was made, and the petition, as amended, does not disclose when it was made." The case of Pulaski Co. v. Watson, 106 Ky. 500, 50 S. W. 861, 21 Ky. Law Rep. 61, and Fidelity & Deposit Co. of Maryland v. Logan Co., 119 Ky. 428, 84 S. W. 341, 27 Ky. Law Rep. 66, are not inconsistent with the above. In those cases there was an attempt to attack the settlements collaterally. There had been no action filed to surcharge them as provided by the statute. This is not a collateral attack upon the settlements. It is a direct proceeding to surcharge them.

Sheriffs' settlements under section 4146, when they have been approved by the county court and ordered to record, stand just as the settlements made by personal representatives, guardians, and other fiduciaries which have been approved by the county court and ordered to record. When exceptions are filed by the county attorney to the sheriff's settlements, the action of the court in overruling or sustaining the exceptions is final and conclusive on both the parties as to matters involved in the exceptions, unless an appeal is taken as provided by the section. But, if there are other mistakes in the settlement which are not discovered by the county attorney or not presented in the exceptions filed by him, these matters may be presented by any party in interest by a suit to surcharge the settlement. If the sheriff should discover that a mistake had been made against him, he may bring a suit or, if the county finds that a mistake has been made against it, it may bring a suit. The settlement is prima facie correct. It cannot be attacked collaterally. It can only be surcharged in a

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direct action to correct the mistake. But it is not the policy of the law to cut off the corrections of mistakes in the settlements; for thus great injustice would be done. The action to surcharge the settlement is an action for relief for fraud or mistake under section 2519, Ky. Stats., 1903, and must be brought within five years after the mistake has been discovered or after it might have been discovered by ordinary diligence. The right of action does not accrue until the settlement is confirmed. The settlement for 1900 was made within five years before this action was brought, and therefore, as to that settlement, the statute of limitations is not applicable. The settlement for the year 1898 was made more than five years before the action was brought; but it is held in Yager v. Bank of Kentucky, 100 S. W. 848, 30 Ky. Law Rep. 1287, and in several previous cases, that limitation must be pleaded in actions of this sort, and that the defense cannot be presented by a demurrer to the petition. The reason for the rule is that there may have been something obstructing the running of the statute. In cases of this character, if the defendant pleads limitation, and the plaintiff does not by his reply show facts sufficient to avoid the plea of the statute, the court may sustain a demurrer to the reply. If the plaintiff avoids the plea of the statute by showing that he did not discover the fraud or mistake within 5 years and could not by ordinary diligence have discovered it within that time, the burden of proof will be upon him, if these allegations are denied, to sustain them by proof. In the case at bar the alleged mistakes in the settlement for 1898 all relate to matters of record. The records were in the county clerk's office. The settlement was made in the county court. In such a case the party cannot be

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heard to say that he could not by ordinary diligence have learned facts plainly shown by the record on its face. The allegation that the plaintiff could not by ordinary diligence have learned the facts in a case like this is not sufficient to avoid the statute; for, by the slightest diligence, he could have learned what the record showed. Section 1884, Ky. Stats. 1903, provides that the officer collecting the county levy shall be allowed the same compensation as officers collecting the same revenue. Section 4148 provides that the following commission shall be allowed by the auditor upon the sum collected and accounted for: "Upon the first $5,000 10 per cent. and upon the residue 4 per cent." All taxes levied by a county in one year constitute one fund and are to be taken in the aggregate in computing the commission due the collecting officer; that is, he is entitled to a commission under these statutes on the first $5,000 at 10 per cent. and on the remainder at 4 per cent. Pendleton County v. McMillan, 104 Ky. 816, 20 Ky. Law Rep. 1017, 48 S. W. 154; Pence v. Nelson, 107 Ky. 66, 53 S W. 25; 21 Ky. Law Rep. 724; Little v. Strow, 112 Ky. 527, 66 S. W. 282, 23 Ky. Law Rep. 1829; Montgomery Co. v. Chenault, 47 S. W. 457, 20 Ky. Law Rep. 704.

Judgment reversed and cause remanded, with directions to the circuit court to overrule the demurrer to the petition, and for further proceedings consistent herewith.

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CASE 35.—PROSECUTION AGAINST ANDREW MILLER FOR MURDER.—November 26.

Miller v. Commonwealth

Appeal from Hardin Circuit Court.

JOHN A. FULTON, Special Judge.

Defendant convicted and appeals—Affirmed.

1. Constitutional Law—Equal Protection of Laws—Discrimination in Selection of Jurors.—Under Const. U. S. Amend. 14, forbidding any State to deny to any person the equal protection of the laws, a statute excluding from jury service persons of the negro race is invalid.
2. Same.—Cont. U. S. Amend. 14, section 1, forbidding any State to deny to any person the equal protection of the laws, does not contemplate any other restriction upon the power of the State to prescribe qualifications of jurors, except to inhibit a disqualification on account of race or color, and does not prohibit the indictment and trial of a negro unless the jury is composed in part of persons of his own race, or of a white person unless the jury is composed in part of persons of the white race.
3. Criminal Law—Appeal—Decisions Reviewable.—Under Ky. Criminal Code Prac., section 281, providing that decisions upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for new trial shall not be subject to exception, the court of appeals can not review the ruling of a circuit court on a motion to quash an indictment because of discrimination against persons of color in the selection of the grand jury, in violation of Cont. U. S. Amend. 14, section 1, forbidding any State to deny to any person the equal protection of the laws.
4. Constitutional Law—Equal Protection of Law—Discrimination in Selection of Jurors.—Ky. Criminal Code Prac., section 281, providing that decisions upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial shall not be subject to exception,

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though prohibiting an appeal from the ruling on a motion to quash an indictment for discrimination against persons of color in the selection of the grand jury finding the indictment does not in meaning or effect discriminate against persons of any race or color, and its enactment is within the bounds of legislative discretion.

5. Criminal Law—Appeal—Right to—Conditions on Granting—Statutory Provisions.—The right of appeal is not a natural or inherent right, but purely a statutory one; and hence the Legislature has power to declare under what conditions the right of appeal, when conferred, may be exercised, and the court of appeals, in exercising its revisory power is restricted by the conditions and limitations imposed by statute.

H. L. JAMES for appellant.

POINTS AND AUTHORITIES.

The appellant before being arraigned and before pleading to the indictment, charging him with murder, filed a plea in abatement and motion to quash and set aside the indictment on the grounds that he is a negro and persons of that race had been discriminated against by the jury commissioners in selecting the grand jury that found the indictment against him, on account of their race, and color, and offered to introduce evidence to sustain said allegation, but the trial court erroneously and arbitrarily overruled his plea and motion without investigating the truth of the statement, and after the court had refused to hear evidence as to the truth of said statement. The appellant was thus denied the equal protection of the laws. (Carter v. Texas, 177 U. S., 443; Torrence v. Florida, 188 U. S., 519; Neal v. Delaware, 103 U. S., 370; Virginia v. Reeves, 100 U. S., 313; Strauder v. West Virginia, 100 U. S., 303; Gibson v. Mississippi, 162 U. S., 579; Williams v. Mississippi, 170 U. S., 213; Haggard v. Comth., 79 Ky., 368; Brannon on Fourteenth Amendment, p. 49.)

N. B. HAYS, Attorney General, and CHAS. H. MORRIS for appellee.

The only point relied on by appellant in this appeal is an alleged discrimination against him, by reason of the fact that the administrative officers of the court by their acts excluded negroes from the grand jury, on account of their race. Upon his plea and motion to set aside or quash the indictment, which was made before arraignment or plea to the indictment, he was not permitted to introduce proof to sustain his plea. This of itself was

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prejudicial error. Counsel seems to have followed closely the practice in the Carter, Strader and Gibson cases.

We can not ask the court to affirm, and would rather not go to the supreme court on this proposition. Appellant should have been permitted to introduce proof upon his plea.

J. R. LAYMAN, Attorney for appellee.

There is but one question in this case in which appellant seriously contends the lower court erred to his prejudice, and that is as to whether the court should have sustained his plea in abatement and motion to quash the indictment. When the case was called for trial defendant filed his affidavit, a copy of which is contained in the record of this case, complaining of the fact that no jurors of his race or color were included in the list of grand jurors finding the indictment, and that no such names were placed in the drum or wheel by the jury commissioner.

Defendant does not claim in his affidavit that his substantial rights have been prejudiced by reason of the failure to have persons of his own race or color on the grand jury, nor does he claim that any member of the grand jury had any prejudice against him on account of his race or color, or that they failed to give his case a full and fair investigation or to pass upon it impartially.

AUTHORITIES CITED.

Ky. Stats., section 2241; Acts General Assembly of Ky., 1906, p. 521; Roberson's Crim. Law, vol. 1, p. 211; Comth. v. Skeggs, 66 Ky., 19.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellant, Andrew Miller, was indicted in the Hardin circuit court for the crime of murder. The trial resulted in a verdict at the hands of the jury finding him guilty and fixing his punishment at confinement in the penitentiary for life. Judgment was entered upon the verdict, and sentence pronounced in the usual manner. The appellant having been refused a new trial, complains of the judgment, and by this appeal asks its reversal, upon the sole ground that

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the trial court erred in overruling his plea in abatement and motion to quash the indictment.

The plea and motion were entered upon the calling of the case for trial and before appellant was required to plead to the indictment, and were based upon his affidavit, which declared him to be a negro, and that he and his race had on account of their race and color, and in violation of the fourteenth amendment of the Constitution of the United States, been discriminated against by the jury commissioners charged with the duty of selecting the grand jury that found and returned the indictment under which he was convicted, in that "they selected no person or persons of color, or of African descent, known as negroes, to serve on said grand jury, but, on the contrary, did exclude from the list of persons to serve as such grand jurors all colored persons or persons of African descent, known as negroes, because of their race and color, and that said grand jury were composed of persons exclusively of the white race, while all persons of the colored race, or persons of African descent, known as negroes, although consisting of and constituting about one-fifth of the total number of persons qualified for jury service, were excluded therefrom on account of their race and color, and have been so excluded therefrom on account of their race and color, and have been so excluded from serving on any jury in this court for a great many years. * * *" The order of the court recites, in substance, that appellant offered to introduce evidence to sustain the foregoing statements of the affidavit, but that the court refused to hear such evidence, and overruled the plea and motion without doing so. It will be observed, however, that neither the affidavit or order mentions the names of the witnesses by whom the evidence in question would

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be furnished, or that they were present to testify, nor were the particular facts to which it was claimed they would severally testify set forth in appellant's affidavit, by affidavits of the witnesses themselves or by the bill of exceptions in the form of an avowal. Moreover, it does not appear from the appellant's affidavit that the assessor's books of Hardin county, from which the jury commissioners are by law required to select the names of persons qualified for jury service, contain the names of any persons of the negro race qualified for jury service, or that appellant was, in fact, prejudiced by the failure of the commissioners to select persons of that race to serve as members of the grand jury, if there was such failure.

This court, recognizing the binding force of section 1 of the fourteenth amendment of the Constitution of the United States, which forbids any state to "deny to any person within the United States the equal protection of the laws," as far back as the year 1880, declared the then existing statute prescribing the qualifications of jurors unconstitutional in so far as it excluded from the jury service persons of the negro race (Commonwealth v. Johnson, 78 Ky. 509; Commonwealth v. Wright, 79 Ky. 22, 1 Ky. Law Rep. 258, 42 Am. Rep. 203; Haggard v. Commonwealth, 79 Ky. 366, 2 Ky. Law Rep. 356), and shortly thereafter the statute was so amended by the Legislature as to conform to the requirements of the fourteenth amendment of the federal Constitution. It is not declared by the fourteenth amendment, nor has any court, federal or state, ever held, that a negro cannot lawfully be indicted and tried unless the jury is composed in part of persons of his own race, or that a white person cannot lawfully be indicted and

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tried unless the jury is composed in part of persons of his own race. The fourteenth amendment contemplates no other restriction upon the power of the State to prescribe the qualifications of jurors, except to inhibit a disqualification on account of race or color. Strauder v. West Va., 100 U. S. 303, 25 L. Ed. 664; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Gibson v. Mississippi, 162 U. S. 579, 16 Sup. Ct. 907, 40 L. Ed. 1075; Carter v. Texas, 177 U. S. 443, 20 Sup. Ct. 687, 44 L. Ed. 839; Tarrance v. Florida, 188 U. S. 519, 23 Sup. Ct. 402, 47 L. Ed. 572. Upon the face of the record it may well be doubted whether the steps taken by appellant to sustain his plea in abatement and motion to quash the indictment so conformed to the practice obtaining in the courts of this State as to make it appear that he was prejudiced in any substantial right by the refusal of the circuit court to quash the indictment. But, without resting our decision of the question involved on that ground, there is another and sufficient reason why this court cannot exercise revisory power as to the alleged error complained of. It is forbidden by section 281 of the Kentucky Criminal Code of Practice, which provides: "The decision of the court upon challenges to the panel, and for cause, upon motions to set aside an indictment and upon motions for a new trial, shall not be subject to exception." Section 158 contains three grounds upon which the circuit court may set aside an indictment; the first being, "A substantial error in the summoning or formation of the grand jury;" but no exception can be taken by the Commonwealth to the action of the circuit court in setting aside an indictment, or by the defendant to its refusal to do so. The power conferred upon the circuit court by the

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mandatory provisions of section 281 is broad and beyond the revisory control of this court. Commonwealth v. Simons, 100 Ky. 164, 37 S. W. 949, 18 Ky. Law Rep. 648. Section 281 was enacted after the repeal of the former statute disqualifying persons of the colored race for jury service. It does not in meaning or effect discriminate against persons of any race or color, and its enactment, according to numerous decisions of this court, was clearly within the bounds of legislative discretion. The right of appeal is not a natural or inherent right. Indeed, in the State of Kentucky an appeal in a criminal or penal case was not allowed prior to the year 1853, but the right was then conferred by statute, and has ever since existed by legislative sanction, subject to certain conditions and limitations imposed by the same power. If competent to confer or withhold the right of appeal, the Legislature may declare under what conditions the right, when conferred, may be exercised, and the courts of the State, in administering the law, must obey, the legislative will by observing the restrictions imposed. In other words, in matters appealable, the revisory power of this court is restricted by the conditions and limitations imposed by statute.

As said by this court in Redmon v. Commonwealth, 82 Ky. 333, 6 Ky. Law Rep. 225: "From these provisions of the Code the jurisdiction of this court to try and determine felony cases is derived. The Constitution confers no jurisdiction upon this court in such cases, but authorizes the Legislature to grant such jurisdiction as it may think proper. We have no right to depart from or to enlarge the limits of the jurisdiction, as prescribed by the statute, than we would have to assume jurisdiction in case the

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Legislature had seen fit not to confer any appellate jurisdiction. * * * We have nothing to do with the policy or impolicy of conferring jurisdiction, in criminal cases, upon this court whether limited or unlimited. That belongs to the legislative department. Errors such as that complained of here were left to the discretion of the lower or trial court, where the whole jurisdiction might have been left, if the Legislature should have thought proper." Rutherford v. Commonwealth, 78 Ky. 639; Meece v. Commonwealth, 78 Ky. 586; Curtis v. Commonwealth, 62 S. W. 886, 23 Ky. Law Rep. 267; Turner v. Commonwealth, 80 S. W. 197, 25 Ky. Law Rep. 2161; Alderson v. Commonwealth, 74 S. W. 679, 25 Ky. Law Rep. 32; Howard v. Commonwealth, 118 Ky. 1, 80 S. W. 211, 81 S. W. 704, 26 Ky. Law Rep. 148, 363, 465.

For the reasons indicated, the judgment is affirmed.

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CASE 39.—ACTION BY THE COMMONWEALTH OF KENTUCKY AGAINST IRENE GATES TO ASSESS FOR TAXATION HER RIGHT TO OPERATE A FERRY.—December 3.

Gates v. Commonwealth

Appeal from McLean Circuit Court.

T. F. BIRKHEAD, Circuit Judge.

From the judgment defendant appeals—Reversed.

Ferries—Taxes on Franchise.—Ky. Stats., 1903, section 1803, provides for the establishment of a ferry at the instance and for the benefit of the owner of the land on which it is located, or of some one who has obtained the privilege from such owner. By Ky. Stats., 1905, section 4077, every ferry company is required to pay a tax upon its franchise in addition to its ad valorem tax. Ky. Stats., 1903, section 4082, provides that persons or associations of persons engaged in the business of any of the corporations mentioned in section 4077, shall be liable for taxes upon their capital and property or evidences of their rights in like manner as if they were a corporation. A landowner leased her right to operate a ferry. Held, That the landowner's right to establish and operate a ferry is not a taxable franchise, but that he who secures the right to operate the ferry is liable for the tax imposed.

L. W. GATES and W. B. NOE for appellant.

POINTS AND CITATIONS.

(a) A ferry right or franchise is intangible personal property. (Ky. Stats., section 4022.)

(b) Personal property of a resident of Kentucky is taxable only at the domicile of the owner. (Gates v. Barrett, etc., 79 Ky., 296; Wren v. Boske, 24 Ky. Law Rep., 1780; Boske v. Security Trust & Safety Vault Co., 22 Ky. Law Rep., 181; Comth. v. Union Refrigerator Transit Co., 80 S. W., 491; Ayer & Lord Tie Co. v.

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keown, 93 S. W., 589; Langdon-Creasy Co. v. Trustees, etc., 25 Ky. Law Rep., 823; O'Callaghan's Exor. v. City of Owensboro, 111 Ky., 765; Comth. v. Haggin, 99 S. W., 907.)

(c) Section 4077, Ky. Stats., does not apply to franchises exercised exclusively within Kentucky, or those owned by individuals, but only applies to those franchises or corporations named in section 4081. (Board of Councilmen of City of Frankfort v. Stone, Auditor, etc., 108 Ky., 403 to 406.)

(d) Section 4082, Ky. Stats., does not authorize McLean county to tax intangible personal property or franchise of owner whose domicile is in Jefferson county. (Board of Councilmen of City of Frankfort v. Stone, Auditor, etc., 22 Ky. Law Rep., 502.)

(e) The franchise tax imposed by section 4077 should be paid by the person who exercises the franchise and not by the owner who has no control over it. (Jefferson County v. Board of Valuation and Assessment, 78 S. W., 445.)

JOE H. MILLER for appellee.

1. The McLean county court has jurisdiction to list this property for taxation. Ky. Stats., section 4241; Comth. of Ky. v. Adams Express Co., 26 Ky. Law Rep., 190.)

2. This ferry franchise is liable for taxation for State and county purposes for the years 1905 and 1906. (Gen. Stats., ch. 42, section 4; Ky. Stats., section 1803; Trustees of Maysville v. Boon, 2 J. J. M., 225; Lytle, etc., v. Breckinridge, 3 J. J. M., 663; 22 Cyc., p. 60, note 7; 19 Cyc., p. 499; Bowman v. Worthen, 3 Fed. Case No. 1740, 2 McLean 376; Ky. Stats., section 4077; Jefferson County v. oard of Valuation & Assessment of Ky., 25 Ky. Law Rep., 1637.)

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

Mrs. Irene Gates was the owner of a tract of land bordering on Green river, in McLean county. The land on the opposite side of the river was owned by another person. These two owners leased their ferry privilege appurtenant to their lands to one Riggs, who obtained from the county court of McLean county the right to operate a ferry and executed

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bond required by law. Section 1803, Ky. St. 1903, reads. "A ferry shall be established at the instance and for the benefit of the owner of the land on which it is located, or of some one who has obtained from the owner the privilege of using the same for that purpose." By other sections of the statute provision is made for condemnation of land on the opposite side of the river if it cannot be obtained by agreement of the parties. This proceeding was begun in the county court of McLean county to assess for taxation as omitted property the franchise, so called, of Mrs. Gates, to operate a ferry. The court valued her one-half interest at $7,500, and listed it for several years as omitted property. Upon appeal to the circuit court the judgment of the county court was affirmed.

The question for decision is: Was the privilege mentioned in section 1803 of the statutes, supra, a franchise taxable under the statutes of this State? By section 4077, Ky. St. 1903, every ferry company is required to pay a tax upon its franchise in addition to its ad valorem tax, and by section 4082, Ky. St. 1903, it is provided: "Wherever any person or association of persons not being a corporation nor having capital stock, shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article (section 4077) then the capital and property, or the certificates or other evidences of the right or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation." It is insisted for the

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Commonwealth, and was so held by the circuit and county courts below, that the rights of the owners of lands adjacent to a navigable stream to have a ferry established and to operate same was a taxable franchise under section 4077, supra. Mrs. Gates and the opposite owner did not operate a ferry. Either of them might have obtained the privilege to do so, but, instead of obtaining it, they leased the right, as is expressly permitted by the statutes, to another, in this case Riggs, who applied to the county court for the privilege, and was accordingly granted it. We are of opinion that the person to whom the license to operate the ferry was granted is the one who is liable for the franchise tax imposed by section 4077, Ky. St. 1903. The right of the owners of the adjacent lands to have a ferry established is not a taxable franchise. The statute does not contemplate the taxation of such right. It merely gives to such owner priority in the matter of applying for the ferry privilege. Aside from the order of the county court establishing the ferry and authorizing such owner to operate it, whereupon he becomes a common carrier, the owner of the lands adjacent to the stream has not the right to operate a ferry. The fact that such owner has priority in obtaining the right might affect the value of the land; but such right is not separate property taxable independent of its connection with the ownership of the land out of which it springs.

We conclude that the judgment taxing the so-called franchise of the appellant was erroneous, and it is reversed, with directions to remand the proceedings to the county court, where they will be dismissed.

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CASE 40.—ACTION BY THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v. HENRY R. PREWITT, INSURANCE COMMISSIONER OF KENTUCKY.—December 3.

127 399
128 135

Mutual Life Ins. Co. of N. Y. v. Prewitt, Ins. Com.

Appeal from Franklin Circuit Court.

R. L. STOUT, Circuit Judge.

From a judgment of dismissal the plaintiff appeals —Reversed.

1. Statutes—Operation—"Law."—The statutes of a State have no extraterritorial force. They are not "law" in another State, in the ordinary sense of the term.
2. Insurance—Regulation—Authority of Insurance Commissioner. —The insurance commissioner is a creature of the statute, possessing no authority except that which the statute confers on him; and, where he undertakes to act in a case in which the statute gives him no authority, he may be controlled by injunction.
3. Same—Foreign Insurance Companies—Licenses—Revocation—Grounds.—Ky. Stats., 1903, section 634, authorizing the issuance of a license to foreign insurance companies which have "fully complied with the laws of this State," and section 753, authorizing the revocation of such license, where a company has "failed to comply with the law," etc., do not authorize the revocation of a license unless the company has violated the statutes of the State governing insurance companies, the quoted words referring to the provisions of the statutes; and the insurance commissioner can not revoke a license of a foreign company because it has discharged its State manager by reason of his candidacy for trustee of the company on a ticket in opposition to the ticket supported by the trustees in office, and because it has spent a part of the company's

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funds in soliciting support for its candidates for trustees, the amount so spent not affecting its solvency.

4. Appeal — Dismissal — Grounds — Moot Question.—Where the right of a foreign insurance company to do business in the State is involved in a suit by it against the insurance commissioners, an appeal by it from a decree dismissing the suit and dissolving an injunction enjoining the commissioner from refusing to continue the company's authority to do business in the State does not raise a moot question, and it will not be dismissed, though at the time of the decision of the court of appeals its judgment will not have any real value, since its judgment will relate to the date of the submission.

5. Same.—Where a case on appeal necessarily stands over for argument or for judgment from term to term, a party will not be prejudiced by the delay, but will be allowed to enter judgment retrospectively to meet the justice of the case.

Chief Justice O'Rear and Judges Nunn and Lassing dissenting.

GRUBBS & GRUBBS for appellant.

JOHN W. RODMAN, HAZELRIGG, CHENAULT & HAZELRIGG of counsel.

POINTS MADE.

1. The laws of Kentucky do not require an annual license to be issued to a foreign life insurance company, but when such corporation shall have once been admitted to transact business therein, and thereafter meets all local statutory requirements, the authority continues until there has been a legal revocation. (Ky. Stats., sections 631,3,4; Ky. Stats., section 633; Ky. Stats., section 753; Security Mutual Life v. Prewitt, 202 U. S., 246.)

2. The injunction granted herein preserves the status, and so long as it stands the questions involved can not become abstract. (Bankers' Life v. Howland, 73 Vt., 1; Traders' Ins. Co. v. Van Cleve, 183 Ill. 330, 47 L. R. A. 795; Liverpool, etc., Co. v. Clunie, 88 Fed., 160; Mutual Life Ins. Co. v. Boyle, 82 Fed., 705; Metropolitan Life Ins. Co. v. McNall, 81 Fed., 888.)

3. The State having received as of December 31, 1906, the annual tax due from appellant, the payment thus made, even if a license were necessary, would, other requirements having been met, operate as a license until December 31, 1907. (Ky. Stats., section 4226; Dakota v. Glidden, 113 U. S., 225; Lord v. Veazie, 8 How., 252.)

N. B. HAYS, Attorney General, and C. H. MORRIS for appellee.

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The appellee contends that this action should be dismissed, because,

First. That appellant insurance company can not be heard to say that no license is required of it by statute, because it has for many years (as shown by affidavit of Prewitt, commissioner paid the fees required, and accepted the license issued by the commissioner, and therefore, there has been a contemporanous construction of the laws, for a long period of time, both by the appellant insurance company and the insurance commissioners. On this we need not quote authorities; neither are we driven to this contention, because,

Second. The appellant insurance company is incorporated under the laws of New York, consequently a foreign corporation, and being controlled by the laws of that State, is necessarily governed under the reciprocal or retaliatory laws of Kentucky.

WILLIAM LINDSAY for appellee.

The question before this court is not whether the reasons given by the commissioner for the revocation of the certificates of authority issued to the appellee or its agents are good and sufficient, but whether he has exercised a power conferred on him by law.

Our contention is:

First. That the law does not require him to state his reasons for the opinion, in obedience to which he acts in revoking or suspending certificates of authority to a foreign insurance company, or to its agents. It is therefore indifferent whether he gives good reasons or insufficient ones, if his act be within his statutory authority. We do not concede, however, that the reasons given by the commissioner are not good, or that they are insufficient.

Second. That the action of the commissioner is final and conclusive, and that no court has authority to review that action or to intervene, to the end that it may be nullified.

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

The Mutual Life Insurance Company of New York, having complied with the laws of this State, license to transact business in this State was issued to its agents by the insurance commissioner. After this

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had been done, and the company had acquired a large business in the State, the Legislature of New York passed an act requiring an election to be held on December 18, 1906, to elect 36 trustees of the company. Under the act the trustees then in office were charged with the duty of naming a ticket, designated the "Administration ticket." Pursuant to this direction, the trustees in office named such a ticket. The law also provided that any number of policy holders not less than 100 might name a ticket. Under this provision two additional tickets were named; one designated the "United Committees ticket," and the other the "Selected Fusion ticket." Biscoe Hindman was the company's manager for Kentucky, under a contract which it had power to terminate on 30 days, notice. The management of the company earnestly supported the Administration ticket. Biscoe Hindman was a candidate for trustee on one of the opposition tickets, and the contest was a bitter one. The opposition to the Administration ticket charged that the affairs of the company had been mismanaged, and urged that the company should be placed in new hands. The trustee in office notified Hindman that he must either retire from the opposition ticket or resign as manager of the company. He refused to do either, and they removed him, and also removed other managers for like cause. Thereupon, Henry Prewitt, the insurance commissioner for this State, addressed to the president of the company the following: "Mt. Sterling, Ky., Oct. 4, 1906. President Charles A. Peabody, Mutual Life Insurance Company: Associated Press dispatches today state that Col. Hindman, of Louisville, Ky., has been dismissed from your service on account of his having been nominated as a candidate on the opposition

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ticket to the administration ticket. Is this true? Any rule or by-law of your company which permits such action on your part, to say the least, is unjust and unfair to the policy holders of your company, and in spirit un-American and tyrannical. Such a company, managed by men that undertake to coerce employees by such methods, will not be tolerated in this State. You are notified to appear at Frankfort, Ky., on or before October 13th, and give a full account of your actions in reference to this matter. Henry Prewitt, Insurance Commissioner." The president of the company appeared before the commissioner and admitted the facts stated, but insisted that the management had but done its duty, his position being that the first duty of a manager of the company was to solicit people for life insurance; that the basis of life insurance is confidence in the company's solvency and the integrity of its management; that it is impossible for an agent to do his full duty to the company in soliciting life insurance when he is publicly proclaiming that the company is unworthy of confidence, and that the management is corrupt or incapable; that such an agent would do the company incalculable harm; that his utterances would be given peculiar weight by reason of his position, and that no man has the right to insist on wearing the livery of the company for the purpose of using it to destroy public confidence in the management of the company; that he had the right to exercise free speech, but that he should exercise it against the company as an individual and not as its manager. On the other hand, the commissioner concluded that the trustees had no right to remove Hindman for the cause stated. It also appeared that a letter had been sent out to every policy holder asking his sup-

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port of the Administration ticket, and giving reasons therefor in view of the charges that had been made. The cost of the sending out of these letters amounted to $10,000, and as it is claimed was paid out of the company's funds. The commissioner was proceeding to cancel the license to the company's agents, when this suit was filed enjoining him from so doing. On final hearing the circuit court dissolved the injunction and dismissed the petition, and the insurance company appeals.

The judgment of the commissioner to revoke a license depends upon section 753, Ky. St. 1903. "If he is of the opinion, upon examination or other evidence that a foreign insurance company is in an unsound condition, or if it has failed to comply with the law, or if its officers or agents refuse to submit to examination or to perform any legal obligation in relation thereto, or, if a life insurance company, that its actual funds are less than its liabilities, he shall revoke or suspend all certificates of authority granted to it or its agents." It is manifest from the proof that the insurance company was not in an unsound condition. Its assets were far in excess of its liabilities, and its solvency was undoubted. Whether the $10,000 spent in postage was paid by the company or was a proper expenditure to preserve the good name of the company and maintain the confidence of its policy holders we need not consider, as manifestly from the proof this expenditure affected in no way the solvency of the company. It is not maintained that the officers or agents of the company had refused to submit to an examination or to perform any legal obligation in relation thereto, or that its actual funds were less than its liabilities. It is simply insisted that the company had failed to

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comply with the law; and so the case turns wholly on the meaning of this provision of the act.

Further on in the same section there is this provision as to domestic companies: "If upon examination, he is of opinion that any domestic insurance company is insolvent, or has exceeded its powers, or has failed to comply with any provision of law, or that its condition is such as to render its further proceedings hazardous to the public or to its policy holders, he shall revoke or suspend all licenses issued to it or its agents." It will be observed that as to foreign or domestic companies there is substantially the same language; it being provided that the license of the domestic company shall be revoked where it has failed to comply with any provision of law. As to domestic companies formed under the statute, these words can naturally refer only to failures to comply with some provision of the statute; for the act must be read as a whole, and, as it describes how domestic companies may be organized and when they shall commence business, it is manifest that, when the Legislature provided for the revocation of their licenses for the failure to comply with any provision of law, it had in mind those things which it had required these companies to do before doing business, and not the laws of other States. The statutes of a State have no extraterritorial force. They are not law in another State in the ordinary sense of the term. The same principle must be applied to foreign insurance companies. By section 634 of the statute (Ky. Stats. 1903) every insurance company not organized under the laws of this State is required to manifest certain things to the insurance commissioner. It then provides: "And the commissioner, upon being satisfied that such company has fully complied with the laws

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of this State, and is possessed of the legal reserve, shall furnish to such agents as the company directs a license to transact business as agent for said company under the seal of the insurance department." The insurance company might impose upon the commissioner and obtain a license where it had not complied with the laws of the State, or done the things required to be done by it before the license was issued; and so it was provided by section 753 that, if any company so failed to comply with the law, its license may be revoked after the license has been issued. The words "comply with the law" in section 753 have the same meaning as the words "fully complied with the laws of this State" in section 634. It is the duty of an insurance company to pay a loss when it occurs if a just liability. Its failure to pay a just loss would be a failure to comply with the law, although the loss was disputed, but it was not the intention of the Legislature that every infraction of the law by an insurance company should be cause for the revocation of its license. Under such a construction, no insurance company could afford to do business in this State. The insurance commissioner is the creature of the statute. He has no authority except that which the statute confers upon him. In the state of case in which the statute authorizes him to revoke a license, his discretion, unless exercised arbitrarily, cannot be controlled by injunction; but, when he undertakes to act in a state of case in which the statute gives him no authority to act, he may be controlled by injunction. He is a ministerial officer, and his acts beyond the authority conferred upon him by law have no force. The law is the source of his authority and all of his acts must be within the limits of that authority. It is the province of the courts

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to construe the statute, and determine the scope of his authority. State of Minnesota, etc., v. Fidelity & Casualty Co., 39 Minn., 538, 41 N. W. 108; Insurance Co. v. Wilder, 43 Kan. 731, 23 Pac. 1061; Liverpool & London & Globe Insurance Co., etc, v. Clunie (C. C.) 88 Fed. 160; North British Mercantile Co. v. Craig, 106 Tenn. 621, 62 S. W. 155; Traders' Insurance Co. v. Van Cleave, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90

For the reasons given, we conclude that the commissioner was not authorized by the statute to revoke the licenses to the company's agents on the facts shown, and that the circuit court erred in dismissing the petition and dissolving the injunction. The motion to dismiss the appeal is not well taken. By the injunction the defendant was enjoined "from refusing to continue plaintiff's authority or licenses to its agents or in any manner preventing plaintiff or its agents conducting said business in the State of Kentucky." The purpose of the injunction was to preserve the status then existing until the rights of the parties were settled. The right of the plaintiff to do business in the State is involved, and so the questions are real, not moot. Not only so, but the questions admittedly were real and of value when the case was heard and submitted. The judgment of this court relates to the date of the submission, and so revivor is unnecessary if either of the parties die after submission. Goggin's Adm'r v. Cord, 7 Ky. Law Rep. 39, 3 Cyc. 407, and cases cited. It is a legal maxim that the act of the court shall prejudice no one. The failure of this court to reach a case and decide it promptly after submission cannot be per-

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mitted to defeat the substantial rights of a litigant. In Broom's Legal Maxims, 121, under the maxim, "Actus curiæ neminem gravabit," it is said: "The above maxim is 'founded upon justice and good sense; and affords a safe and certain guide for the administration of the law.' In virtue of it, where a case stands over for argument from term to term on account of the multiplicity of business in the court, or for judgment from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgments retrospectively to meet the justice of the case; and therefore, if one party to an action die during a curia advisari vult judgment may be entered nunc pro tunc, for the delay is the act of the court, and therefore neither party should suffer for it."

Judgment reversed, and cause remanded for judgment as above indicated.

CHIEF JUSTICE O'REAR and JUDGES NUNN and LASSING, dissenting.

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CASE 41.—SUIT BY S. S. MOORE AND OTHERS AGAINST THE CITY OF GEORGETOWN.—December 31.

127 409
128 367

Moore v. City of Georgetown

Appeal from Scott Circuit Court.

R. L. STOUT, Circuit Judge.

From a judgment dismissing the petition the plaintiffs appeal—Affirmed.

1. Municipal Corporations—Fourth Class Cities—Division Into Wards—Power.—Ky. Stats., 1903, section 3484, relating to fourth class cities, provides that the legislative power shall be vested in the mayor, and not less than six nor more than twelve councilmen, as may be provided by ordinance, members of the council to be qualified voters in the city, resident of the ward for which they stand for at least six months prior to their election, if the city is divided into wards; and section 3485 declares that, if the city shall not be divided into wards, the councilmen shall be chosen from the voters of the city, and that any city not divided into wards may, not less than 60 days before any November election, be divided into not exceeding six wards, etc. Held, That such sections constituted a proper exercise of the legislative power to authorize the division of cities of the fourth class into wards, and to provide for the election of councilmen from the respective wards.
2. Constitutional Law—Governmental Powers—Construction—Infringement of Legislature.—The city council of a city of the fourth class, being authorized by Ky. Stats., 1903, sections 3484, 3485, to divide the city into wards, and provide for the election of councilmen from their respective wards, and there being no constitutional or statutory provision requiring that such division be so made as to provide equal representation, the courts can not interfere with the exercise of the legislative power so conferred by invalidating an ordinance so dividing the city into wards as to cause unequal representation.

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LLUWELLYN F. SINCLAIR for appellants.

The questions involved in this case have never been before this court for determination in the past. It is not only a new question, but a very important one. Municipal government effects the happiness, peace, health, comfort and property interests of the people who live in cities more directly, than county, State, or National government, therefore, I repeat that the correct solution of the law on the subject in controversy here, is of great importance not only to the inhabitants of Georgetown, but to the people residing in cities throughout the State.

Let us examine for a moment the effect of this ordinance. It will appear from the record that the city of Georgetown contains 3,650 inhabitants and 1,015 voters. Wards 1 and 3 contain combined 1,710 inhabitants and 471 voters, while wards 2 and 4 have a population combined of 1,490 inhabitants and 544 voters. Dividing the population of the entire city by two and you have as a result 1,825 inhabitants, and by a similar division you will have 502 voters. Thus it will be seen that wards 1 and 3 have nearly one-half of the population and voters of the city, and vote as they may the people in these two wards are permitted to have but two representatives in the council under this ordinance, while a bare majority of the voters in wards 2 and 4 enables 223 voters to control the municipal government of the city of Georgetown absolutely, for these two wards are given six members of the council, although they contain only a population slightly in excess when combined to that of the other two wards, and a small number of voters more than wards 1 and 3 contain. Such a system of government as it is demonstrated that this ordinance creates is not only arbitrary, unjust, but is also indefensible and inexcusable.

If I have not studied the subject amiss, government was established among men because moral virtue was not sufficient to govern the world. There is no other excuse for its existence, except that we mortals can not get on without it. It is not a thing to be admired apart from the purpose it serves. Society in its organized form is the State, and in any just system the sovereign will of the people should be permitted to control the instruments of government that the people through that State have created. That is the purpose and end of government as I understand it.

I submit to this court that this ordinance is void for the reasons presented, and ask that the decision of the lower court be reversed.

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Websters' Works, vol. 6, 221-227; Parker v. State, book 18 L. R. A., 567; Houghton Co. Supervisors, v. Blacker, book 16, L. R. A., 432; Giddings v. Blacker, book 16 L. R. A., 402; State v. Cunningham, book 15 L. R. A., 561; Van Bokkelen v. Canaday, 73 N. C., 198; Websters Report on Apportionment, Cong. Rec., 1332; Baird v. Board Supr., 138 N. Y., 95; Ky. Stats., section 3485; Constitution of Ky., section 33; Constitution of Ky., section 116; Smith, Munic. Cor., vol. 1, 97; Hildreth v. Cincinnati, 3 Nisi Prius 127, 6 O. Dec. 196; Am. & Eng. Ency. of Law, vol. 20, 1155; Smith, Munic. Cor., vol. 1, 95; Smith, Munic. Cor., vol. 1, 525; Cooley, Con. Lim., 5th Ed., 243; Calder v. Bull, 3 Dallas U. S., 385; Story Case, cited Cooley, Con. Lim., 5th Ed., 198; Benson v. Mayor N. Y., 10 Barb., 223-224; Goshen v. Stonington, 4 Conn., 209-225; Cooley, Con. Lim., 5th Ed., 208-209,454,483,487; People v. Rice, book 16 L. R. A., 836; Constitution of Ky., section 2; Constitution of Ky., section 3; Constitution of Ky., section 145.

JAMES F. ASKEW and HAZELRIGG, CHENAULT & HAZELRIGG for appellees.

Having briefly stated the reasons why plaintiff's version of the law is not correct and believing that upon a re-study of the subject he will come to the same conclusion, we suggest that these plaintiffs are in no danger of suffering the imaginary ills created by the active imagination of them and their friends; that they still have a right to exercise the powers of the legislative department of the State before rushing into court and asking that the court take a hand in the internal government of the defendant city.

We have shown, we think, that this defendant city has a right to pass this ordinance. The plaintiff's brief is without index so that we can not, without great labor, go over the whole of it, but we will say that it is quite an eloquent production and that it lacks only two things to make it artistically perfect; one is the incorporation of the Declaration of the Independence and the other is the poem of the famous ride of Paul Revere.

Believing that the judgment ought to be affirmed, we so ask.

AUTHORITIES CITED.

Brown v. Holland, 17 Ky. Law Rep., 149; Prouty v. Strover, 11 Kan., 235; People v. Rice, 135 N. Y., 473; Constitution of Ky.,

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sections 156, 160; Ky. Stats., section 3485; People v. Carter, 16 L. R. A., 836.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

This litigation involves the validity of an ordinance enacted by the board of council of Georgetown—a city of the fourth class—in January, 1905, dividing the city into four wards. It was assailed by appellants, plaintiffs below, upon the ground that it violated the fundamental principles of representative government, in that the population of the wards was grossly unequal, and the representation from the several wards in the council was not fairly distributed according to population. The lower court dismissed the petition, and the complainants appeal.

The Constitution divides the cities and towns of the Commonwealth into six classes, providing that "the organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same power and be subject to the same restrictions." In section 160: "When any city of the first or second class is divided into wards or districts, members of legislative boards shall be elected at large by the qualified voters of said city, but so selected that an equal proportion thereof shall reside in each of the said wards or districts; but when in any city of the first, second or third class, there are two legislative boards, the less numerous shall be selected from and elected by the voters at large of said city. But other officers of towns or cities shall be elected by the qualified voters therein or appointed by the local authorities thereof as the General Assembly may by general law provide." This is the only section of the Con-

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stitution that in any way treats of the election of members of the legislative boards, and it will be observed that it is silent as to cities of the fourth or fifth classes and towns of the sixth class; the entire matter in these municipalities being left without limitation or restriction to the control and regulation of the legislative department of the State. The only statutory provision relating to the subject under consideration is found in section 3484, Ky. Stats., 1903, which is a part of the law governing fourth-class cities. There it is provided in part that "the legislative power shall be vested in a mayor, and not less than six nor more than twelve councilmen, as may be provided by ordinance. The members of the council shall be qualified voters in the city, resident of the ward from which they stand for at least six months prior to their election, if said city is divided into wards." And, further, in section 3485: "The members of the board of council and all other elective officers of cities of the fourth class shall be elected at the times and for the terms prescribed by the Constitution. The members of the board of council of each city shall be elected by the qualified voters of the wards for which they respectively stand, if the city is divided into wards; otherwise they shall be elected by the qualified voters of the city. * * * The board of council or board of trustees, as the case may be, of any city not divided into wards may, not less than sixty days before any November election held for the election of councilmen, divide the city into not exceeding six wards, which shall remain so constituted unless changed or abolished by future board of council." In Brown v. Holland, 97 Ky. 249, 30 S. W. 629, 17 Ky. Law Rep. 149, this court had under consideration a question involving the right

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of the board of council in cities of the fourth class to divide the city into wards, and elect members of the board from the several wards in place of electing them from the city at large; and, after full investigation, it was held competent for the Legislature to authorize the division of cities of this class into wards and to provide for the election of councilmen from the respective wards. This ruling, supported as it is by sound reasoning, is in accordance with the legislative intent, and seems conclusive of the right of the council to divide cities of this class into wards and elect councilmen from them.

This leaves to be considered only the question whether or not the action of the council in dividing the city of Georgetown into wards, and allotting the number of councilmen to be elected from each ward, is subject to review by the courts, upon the theory that in the manner of its execution it violated a fundamental principle of equality and representative government. Cases of legislative apportionment that transgressed some constitutional provision have been frequently considered by courts of last resort; the latest being that of Ragland v. Anderson, 125 Ky. 141, 100 S. W. 865, 30 Ky. Law Rep. 1199, in which this court held the act of 1906, apportioning the State into legislative districts, invalid because in violation of that section of the Constitution directing that the State should be divided into senatorial and representative districts "as nearly equal in population as may be." If there was constitutional or legislative expression upon the subject indicating a purpose that equality of apportionment or representation must be observed in the division of cities of the fourth class into wards, and the election of councilmen therefrom, we would feel obliged to sustain the appellants in their

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efforts to annul the ordinance assailed; but, in the absence of such direction or adjudication upon the subject, our conclusion is that it was intended both by the Constitution and the Legislature that the people of these minor municipalities should be left free to exercise a discretion in the division of the city into wards and the election of councilmen therefrom. It is true that fair representation and equal apportionment is a valuable privilege, and one that should be adhered to; but, when the legislative department of the State that created these municipalities and provided an elaborate plan for their government failed to adopt either directly or by implication any scheme to regulate or control them in the selection of their legislative boards, we do not feel that the courts are warranted in interfering with the discretion lodged in the people of these cities and their representatives whose duty it is to divide the city into wards. So far as our examination extends, in every instance in which the judiciary has undertaken to interfere with the legislative department of the State or its municipalities in the power of apportionment and representation, authority direct or by implication has been found in the Constitution or the statutes.

In 8 Cyc. p. 777, it is said: "It may be stated as a general principle that statutes will not be held unconstitutional merely because they are unjust and repugnant to the general principles of justice, liberty, or right not expressed in constitutional provisions. * * * The validity of statutes deemed to be in violation of the spirit supposed to pervade all Constitutions has been considered at much length by the courts in a variety of cases; but an examination of the authorities upon this subject leads to the conclusion that the principle involved is more properly

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a question of construction of some necessarily implied constitutional restriction resulting more from express constitutional provisions, than otherwise. The generally accepted rule is that courts will not declare a statute void merely because in their opinion it is opposed to the spirit supposed to pervade the Constitution. The authorities are not in harmony upon this question, but in nearly all of the cases where statutes have been held to be prohibited by the spirit of the Constitution or nature and structure of the government the acts in question have also been held to be in violation of some express or implied constitutional restriction." The text is fully supported by numerous authorities, among them being Cooley's Constitutional Limitations, p. 197, and Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 59 Am. Dec. 759, where the court, through Chief Justice Black, said: "We are urged, however, to go further than this, and to hold that a law, though not prohibited, is not valid if it violates the spirit of our institutions or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But this we cannot do. * * * The great powers given to the Legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to the true course. In the very best a great deal must be trusted to the discretion of those who administer it. In ours the people have given larger powers to the Legislature, and relied for the faithful execution of them on the wisdom and hon-

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esty of that department, and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary. There is nothing more easy to imagine than a thousand tyrannical things which the Legislature may do if its members forget all their duties, disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice. But to take away the power from the Legislature because they abuse it, and give to the judges the right of controlling it, would not be advancing a single step." These well-considered statements, although directed to the legislative department of the State, are equally applicable to the legislative boards of municipalities. In the case before us, we are asked to assume extrajudicial powers by undertaking to interfere with the council's apportionment of a city into wards and order it how to proceed, in the absence of any direction whatever from the legislative department as to the mode or manner of exercising this political and administrative function. This the courts cannot do without trenching upon the rights and prerogatives that belong to other branches of the government. Without legislative direction or constitutional authority to guide or control us in the disposition of a purely political matter, we would be putting up our judgment against that of those in whom the exclusive right has been lodged by the power that created the municipality, and be arrogating to ourselves, wisdom, honesty, and fairness superior to those charged by law with the control of these matters. This we do not feel disposed or authorized to do. The government of these cities in respect to the matter before us has been left

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to the people acting through their boards, and, if the people of these cities desire to alter the method of selecting councilmen or place limitations upon their power in the division of cities into wards, they must apply to the legislative department of the government, or appeal to the good judgment and sound discretion of the members of their local boards. There are a number of cities of the fourth class in this State, and the conditions in no two of them are exactly alike, and it seems probable that it was the intention in the enactment of a general law for their government to allow the legislative board a large discretion in their governmental affairs. Whilst the division of Georgetown into wards by the council and the allotment of representation is apparently unfair and unequal, we do not feel disposed to adjudge that it exceeded the power granted. Nor can we hold that it violates any fundamental principle of government.

Wherefore the judgment of the lower court is affirmed.

CHIEF JUSTICE O'REAR (dissenting). Section 6, Bill of Rights requires that all elections shall be free and equal. A statute providing for an election of officials that gives to the residents of one locality two or three times as much power as is given to the same number in another locality, is obviously unequal. In my opinion the Constitution does not mean that the Legislature may make such unjust and insidious distinction, and show such partiality as utterly destroys the element of equality in elections by the people of a municipality for selecting the officers of the city.

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CASE 42.—SUIT BY BETSY JANE MILLER AND ANOTHER AGAINST CHARLES S. PETTIT CONCERNING A PASSWAY.—December 5.

Miller, &c., v. Pettit

Appeal from Grant Circuit Court.

B. F. MENEFEE, Circuit Judge.

Judgment for defendants, plaintiffs appeal—Reversed.

Easements—Ways—Prescription—Obstruction. — Where plaintiffs had used a passway from their line to a pike along a branch for between 30 and 40 years, free from gates or other obstruction, except at the boundary of plaintiff's land, defendant, the owner of the way and the land adjoining it at the entrance of the pike, could not obstruct the way by gates or by placing poles in the branch, without proceeding under Ky. Stats., 1903, section 4355, giving a county court jurisdiction to make such alterations in a passway as justice may require, and to establish gates if necessary.

H. CLAY WHITE, Attorney for appellant.

POINTS AND AUTHORITIES.

Although this was a parol grant of a passway, and under the statute invalid, its use for more than 15 years continuously, gave to appellants protection, not by the grant, but by adverse user. (Settle v. Cox, etc., 28 Ky. Law Rep., 510; McGruder v. Potter, 25 Ky. Law Rep., 1336; Chenault v. Gravett, 27 Ky. Law Rep., 403; Hansford v. Berry, 95 Ky. Law Rep., 403; Shake v. Frazier, 94 Ky., 143; Butt v. Napier, 14 Bush, 39; Bright v. Dunn, 12 Ky. Law Rep., 689; O'Daniel v. O'Daniel, 88 Ky., 185; Gayle v. Rigg, 27 Ky. Law Rep., 618; Smoot v. Wainscott, etc., 28 Ky. Law Rep., 233.)

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WM. CARNES, Attorney for appellee.

The lower court was certainly authorized, from the proof in this case, to render the judgment as set out on page 76 of record, adjudging the same to be a private passway and a gate way. The case was tried out on the proof, there being no question of law to be settled. I can not see how appellant can complain, and ask this court to reverse the judgment of the lower court in the face of the proof. The lower court has tried this case from the proof as a jury would have done, and the judgment is certained by the proof. The finding of the lower court is not palpably against the evidence, but is sustained by the evidence, if the appellant puts the case in that light before this court, and this court has frequently said "a verdict of a jury shall not be set aside unless the same is palpably against the evidence, and not sustained by the same.

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

Sixty odd years ago, in the division of the lands of Steven Beverly among his children, Elizabeth Brooks, his daughter, received a tract of land not fronting on a public road, and was given a passway over his other lands to the public road to enable her to get in and out. The passway ran along a branch from her line to the public road, a distance of about 400 yards. There was a fence on each side of it. A gate was at her line, but no other gate was on it. She and her husband thus held the land and the passway until the year 1875, when they sold and conveyed it to Pallas Miller. Pallas Miller lived upon it, using the passway until the year 1900, when he died, leaving his wife and daughter in possession; and they are still upon the land. Chas. S. Pettit owns the land on the west side of the passway. They brought this suit against him on January 23, 1906, alleging that they owned the passway and that he had obstructed it, to their damage in the sum of $250. They prayed judg-

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ment determining their right to the passway, free from obstruction and for damages. The defendant did not controvert the plaintiff's right to the passway, but alleged in his answer that it was a gateway, that he had placed gates upon it as he had a right to do, and that he had not obstructed the passway. On final hearing the circuit court sustained the defendant's right to put gates across the passway, and dismissed the plaintiff's petition, with costs. From his judgment, they appeal.

The proof shows that about the year 1878, when Henry Morgan owned a small track of five acres on the west side of the passway near the pike, he erected gates across the passway at the pike, and at the extremity of his south line. Pallas Miller thereupon brought a suit against him. Two or three years after the gates were put up the matter was settled between Miller and Morgan, and the gates from that time on stood open. Miller is dead and Morgan was not introduced as a witness; but the proof is conclusive that these gates were not closed across the passway from the time of this settlement, which was two or three years after they were put up. Things stood thus when Morgan sold out to Pettit. When Pettit came in, the gates were hanging there, but not used. He thereupon put up a new gate near the old one at the extremity of his south line. Near where this south gate was put up there was a "jump off" in the rock, as the witnesses call it, so that the road down the branch was rough. To avoid this jump off, the parties had been driving upon the bank of the branch and along the bank for a few feet. This driving had been done to such extent that there was a beaten track there. Pettit put poles across the branch, and put a gate across the road on the bank. Mrs. Miller

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claimed that the branch was her road and had the poles taken out. He put them back, and she again had them taken out. He put them back the third time, and threatened to shoot any body who took them out. She then brought this suit. The gate which he erected on the bank was wired up; that is, a wire was put around the gate and post, and the ends of the wire were twisted together. The result was that the Millers could not get through at all.

The proof shows that this passway was established as a lane and without gates on it, except at the Miller line. There is nothing in the evidence conducing to show a right to put other gates across it was reserved; and, after such a great length of time, the presumption is in favor of a grant of the way as it has been used. The way is in the branch, and not upon the bank. The defendant had no right to put poles across the branch and stop the road there. The branch is the road. The Millers have only a right to the road as it has been used from its establishment. There are cases holding that where a passway is open through woodland, the owner of the woodland when he clears his land may erect such gates across it as are reasonably necessary for the use of the land. Green v. Goff, 153 Ill. 534, 39 N. E. 975; Hartman v. Fick, 167 Pa. 18, 31 Atl. 342, 46 Am. St. Rep. 658; Ames v. Shaw, 82 Me. 379, 19 Atl. 856. It has been held that the owner of the land may ordinarily erect gates where the passway enters and where it leaves his land. Maxwell v. McAtee, 9 B. Mon. 20, 48 Am. Dec. 409; Bland v. Smith, 23 Am. & Eng. Cyc. of Law, 34 On the other hand, it has been held that, where the way is acquired by prescription and is used as a lane free from gates during the period necessary for perfecting the title, none can be erected

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afterward. Fankboner v. Corder, 127 Ind. 164, 26 N. E. 766; Shivers v. Shivers, 32 N. J. Eq. 578. The passway in question was established in 1843. It has been used since that time as far back as the witnesses can remember. Until recent years there was a fence on both sides of it, and no gate except where the passway began at Miller's line. If the right to a passway may be acquired by prescription, we can see no reason why a passway free from gates may not be acquired in like manner; and where the passway is fenced off as a lane, and is used as such for 30 or 40 years, it must be presumed after such a great length of time, when the parties are all dead, that the persons using the passway were the owners of a right of way, as they held it and used it. On the facts shown, the court should have required the defendant to remove the gate at the pike from the passway, and to take the poles out of the branch. He should also adjudge the plaintiff $50 as reasonable compensation for the obstruction of her way.

If it is proper that the passway be altered by the putting of gates on it or otherwise, relief may be had by an application to the county court under section 4355, Ky. St. 1903; but, until it is so altered, it must remain as it was. That section gives the county court full power to make such alterations as justice to the parties may require; but one of the parties may not alter the passway by his own act without the consent of the other.

Judgment reversed, and cause remanded for a judgment as herein indicated.

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CASE 43.—ACTION BY BANK OF RUSSELLVILLE AGAINST MOSS E. HART AND ANOTHER ON NOTES.—December 5.

127 424
128 845

Hart v. Bank of Russellville

Appeal from Logan Circuit Court.

W. P. SANDIDGE, Circuit Judge.

From the judgment Moss E. Hart appeals—Reversed.

1. Principal and Surety—Husband and Wife—Notes—Presumption—Evidence.—Where a wife's name precedes that of her husband on a note, the presumption that she is the principal debtor, arising from the position of their signatures, may be rebutted by parol proof of surrounding circumstances indicating the contrary.

2. Same—Evidence.—A husband, desiring to bororw $500, procured his wife's signature to a note above his own, and forwarded it to plaintiff bank with a letter, requesting that it be discounted. The proceeds were placed either to the husband's credit on the books of the bank, or held subject to his order, and applied to a draft drawn by him individually through another bank. The husband was not his wife's agent to obtain such loan, and testified that she signed merely as surety. The officers of the bank did not testify in rebuttal, nor did they introduce the books of the bank nor the letter applying for the account. Held, to rebut the presumption arising from the form of the note that the wife was a principal, and relieved her from liability under Ky. Stats., 1903, section 2127, providing that a wife shall not be liable to answer for her husband's debt, unless her estate be set aside for that purpose by deed, mortgage, or other conveyance.

GRUBBS & GRUBBS and BROWDER & BROWDER for appellant.

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S. R. CREWDSON and H. S. McCUTCHEN for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

Appellee, Bank of Russellville, sued the appellant, Moss E. Hart, and her husband, S. B. Hart, in the court below upon two notes; one of $150, bearing date November 29, 1905, due 120 days after date, and the other $250, bearing date December 26, 1905, and due 90 days thereafter. It is admitted that these two notes were renewals of what was left of a matured note of $500 which had previously been executed to the bank by the same parties, and upon which S. B. Hart had paid $100. The appellant, Moss E. Hart, by separate answer, which was later amended, interposed, in substance, the defense that she signed the two notes in question and the original note of $500 as the surety of S. B. Hart, who was then and is now her husband; that they were executed for money borrowed by him of appellee, no part of which was received by her; and that by reason of her coverture and suretyship no liability was incurred by her in placing her signature to the notes. The affirmative matter of the answer as amended was controverted by reply, thereby completing the issues as to the question of appellant's liability upon the notes. There was, however, yet another matter involved in the litigation which seems to have been withdrawn by the parties, or settled. By agreement of parties, a jury was waived, and upon submission of the law and facts to the court judgment was rendered against the appellant, Moss E. Hart, in appellee's favor, for the amounts respectively of the notes in suit. Appellant applied for and was refused a new trial. Hence this appeal.

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Was the appellant, Moss E. Hart, upon the facts presented by the record, principal in the two notes sued on, or only the surety thereon of her husband, S. B. Hart? It is insisted for appellee that, because appellant's name appeared first on the notes, it had the right to presume she was the principal. This would undoubtedly be true if appellee did bona fide regard her as principal, and by reason thereof extended the credit to her. So after all the real question is: Do the facts surrounding the transaction show that appellee bona fide extended the credit to her as principal or was the credit given to S. B. Hart and his wife's signature first merely a device to avoid the statute?

Ordinarily, it will be presumed that the name appearing first on a note as an obligor is that of the principal debtor, but this presumption may be overthrown by the facts of the case, or the conduct of the parties themselves, and it is admissible for one, whose name appears first, or above that of another on a note, to prove that his relation to the obligation is nevertheless that of a surety, and this he may do by parol testimony. Lewis v. Harbin, 5 B. Mon. 564; Emmons v. Overton, 18 B. Mon. 648; Bank v. Gaines, 87 Ky. 601, 9 S. W. 396, 10 Ky. Law Rep. 451; Skinner v. Lynn, 51 S. W. 167, 21 Ky. Law Rep. 185. Section 2127, Ky. St. 1903, declares that the wife's estate shall not be liable "upon a contract made after marriage to answer for the debt, default or misdoing of another, her husband included, unless such estate shall have been set apart for the purpose by deed of mortgage or other conveyance. * * *" As said in Crumbaugh v. Postell, 49 S. W. 334, 20 Ky. Law Rep. 1366, in respect to an attempt to hold the wife liable on certain notes which she had signed with her

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husband and at his request, her name appearing first with the word "principal" attached, and his under hers with the word "surety" added: "In transactions of this kind, the courts must look to the substance, and whatever the parties themselves may designate or name the undertaking of the wife, if in fact it be an attempted assumption by her of the debt of another, she must be held not liable unless she binds herself in the statutory way. Any other course will speedily result in a nullification of the statute."

The facts connected with the transaction were, in brief that: About October 1, 1904, S. B. Hart, desiring to borrow $500, prepared a note for that amount, to which he procured his wife's signature above his own, and this note he forwarded by mail with a letter to the appellee, Bank of Russellville, requesting that it be discounted. It was promptly discounted by the bank, and its proceeds, less discount, either placed to the credit of S. B. Hart upon the books of the bank, or held subject to his order and applied to the payment of a draft drawn by him individually upon appellee through the Kentucky National Bank of Louisville. The inquiry naturally arises: Why did appellee hold the proceeds of the notes subject to S. B. Hart's order and apply them to the payment of his individual draft, if the loan was made to his wife? It cannot be claimed that it was because S. B. Hart was his wife's agent in negotiating the loan, for he did not hold himself out as such agent in applying for the loan, or make the draft as agent. The proceeds of the draft went to the credit of S. B. Hart in the Kentucky National Bank, and the entire amount was checked out by him in payment of numerous demands owing by him individually and for none of which was the wife liable.

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The foregoing facts, and the inferences fairly deducible therefrom, were established by the deposition of S. B. Hart, the only witness in the case. Appellant and her husband could not both testify, and as she knew nothing of the transactions with respect to the discounting of the notes, except that she had signed them at her husband's request, and he knew all about them, he was required to testify as the more important witness of the two. There was no attempt to contradict S. B. Hart. No officer or employe of the bank testified, or offered in evidence the books showing the transactions with S. B. Hart, nor did they exhibit the letter of the latter requesting the loan for which the original note of $500 was executed, a copy of which the writer admitted he failed to retain. The fact that appellant received no part of the proceeds of the original note, of which those sued on were renewals, was well established by the uncontradicted testimony of S. B. Hart, as the following questions and answers in his deposition will show: "Q. Did the defendant, Moss E. Hart, derive any benefit from the discounted note to which you refer above? Ans. No, sir. Q. For whose benefit was the note executed? Who received the proceeds thereof? Ans. For my benefit. I received the proceeds." The checks drawn by S. B. Hart upon the proceeds of the original note paid on the draft made through the Kentucky National Bank are filed with his deposition, and they apparently support his testimony to the effect that he alone received and used the proceeds of the note. It is, to say the least, unusual for money loaned the principal to be paid to the surety, and, notwithstanding its claim that S. B. Hart was the surety, appellee offered no explanation of why it was done in this case. It also appears from the deposi-

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tion of S. B. Hart that he and his wife lived for many years in Logan county before their removal to Louisville, and it is conceded for appellee that its officers were and are well acquainted with both of them and with their financial standing. In view of all this and their knowledge of the circumstances surrounding the discounting of the original note, which, with the uncontradicted testimony of S. B. Hart, were sufficient to overthrow the presumption of appellant's being the principal in the note arising from the position of her name thereon, it is strange that no inquiry should have been made at the time by appellee's officers or agents as to what her actual relation to the transaction was; and stranger still that they should have declined to give their testimony in support of the contention, made in the reply, that the loan evidenced by the note in question was made to appellant, and not to her husband. Their failure to so testify or to disclose the precise facts of the transaction is apparently attributable to their inability to contradict the testimony of S. B. Hart that the loan was to him and in no sense for the benefit of his wife.

It is insisted for appellee that this case is controlled by that of Thompkins v. Triplett, 110 Ky. 824, 23 Ky. Law Rep. 305, 62 S. W. 1021, 96 Am. St. Rep. 472. We are unable to see the analogy. In Thompkins v. Triplett, the husband of the appellee applied to Thompkins for a loan, which was refused, but which Thompkins said he would make to Mrs. Triplett. Triplett then had his wife to sign a note first and delivered this to Thompkins, who thereupon made the loan to her. Thompkins testified, and was not contradicted ,that he gave credit to Mrs. Triplett alone. These facts, in the opinion of this court,

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warranted the conclusion that Mrs. Triplett was the real principal and had received the credit; her husband being a mere agent in the transaction to obtain for her the loan. In our opinion the case at bar is more nearly akin to Planters' Bank v. Major, 76 S. W. 331, 25 Ky. Law Rep. 702. The bank made a loan to Major on notes signed by himself and wife; her name appearing first. The notes were discounted by the bank, and their proceeds placed to the credit of the husband, who afterwards checked it out for his own use, applying part to pay an overdraft due the bank. This court, in declaring the wife not liable on the notes, in part said: "It is perfectly evident that her name was placed first on the notes simply to evade the operation of the statute, which made the notes void as to her if she signed as surety. If such evasions of the statute were tolerated, its purposes of protecting married women from this class of contracts would be entirely defeated." Much the same is the case of Hines v. Hays, 82 S. W. 1007, 26 Ky. Law Rep. 967. F. L. Hays, wishing to borrow money of a bank, offered his mother as surety. The bank refused to accept her, as she was a married woman, but informed Hays they would accept her note for the desired amount with him as surety. The note was thus executed and accepted by the bank and the proceeds placed to her credit. She immediately gave the son a check on the bank for the amount received upon the note, and by means thereof he received it. This was held to be a mere technical arrangement to avoid the effect of the statute prohibiting married women from binding themselves as sureties and was ineffectual to hold her. In the very recent case of Black v. McCarley's Adm'r, 104 S. W. 987, 31 Ky. Law Rep. 1198 a note of $2,000 was sued on. To this

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note were the names of Thos. N. Black, his wife, Mary N. Black, and I. B. Black, as obligors, signed in the order here mentioned. The answer of Mrs. Black alleged that she was surety for her husband, and that he borrowed the $2,000 and used it in his business. Proof was made on the trial that Mrs. Black never saw McCarley or communicated with him, and that the $2,000 for which the note was given was received by the husband, T. N. Black, in a check of the St. Bernard Coal Company, payable to McCarley, and by him indorsed to T. N. Black, who got the money on it. On the state of facts presented, it was held that Mrs. Black was only surety for her husband, in arriving at which conclusion the court said: "The uncontradicted testimony showed that she was his (T. N. Black's) wife at the time of its (the note's) execution. As there was no fact or circumstance conducing to establish that she received the proceeds or any part thereof, a prima facie case was made out in her behalf, and she was entitled to the peremptory instruction requested."

The statute controlling this case (section 2127) was enacted to protect the property of a married woman from the dangerous liability of a surety and to restrict her liability on such debt to the amount of her property actually set aside by mortgage or other writing for that purpose. If, however, the statute can be evaded by merely making her the apparent principal in an obligation of which another, whose name also appears to it, is the real beneficiary, its force will be in great measure abrogated, as a woman who is willing to become surety for another would equally consent to lend her name as an apparent principal. All the husband, who desires to use his wife's estate to secure credit, would have to do would

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be to obtain her signature to a note apparently as principal, which he would readily do if he could secure it as surety. In the matter of mortgaging or conveying her estate as required by the statute to make it liable for the debt of another, it is probable the wife would require more solicitation; it being a more serious matter, and for this reason, as well as to limit her liability, the statute was enacted. In other words, most married women would readily sign a note, even as principal, to accommodate their husbands, when they would hesitate to tie up their property by a mortgage or other writing for the same purpose. While a strict construction of the statute may in some measure impair the credit of a married woman and make it more difficult for her to secure loans, it would influence the lender to satisfy himself affirmatively that in every instance she is principal in a joint obligation, and know that, if he does not, he takes the risk of running against the provision of the statute, and this, we assume, was the very purpose of its enactment.

From the facts presented by the record before us, we are constrained to hold that the appellant, Moss E. Hart, was not the principal, but only a surety, in the notes in controversy, and the $500 note of which they are renewals. If right in this conclusion, it follows that the learned judge of the circuit court erred in the judgment rendered.

Wherefore the judgment is reversed, and cause remanded for a new trial and such further proceedings as may be consistent with the opinion.

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CASE 44.—ACTION BY MARY J. MORGAN AGAINST THE CHESAPEAKE & OHIO RY. CO AND ANOTHER TO RECOVER DAMAGES FOR PERSONAL INJURIES. —December 5.

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Morgan v. Chesapeake & Ohio Ry. Co., &c.

Appeal from Lewis Circuit Court.

JAMES P. HARBESON, Circuit Judge.

Judgment for defendants, plaintiff appeals—Reversed.

1. Carriers—Injuries to Passengers—Foreign Cars—Defects—Duty of Carriers.—Where a passenger was injured by the breaking of an axle on a foreign car being transported as part of a train, due to a sand hole in an axle, and there were tests known to car builders and iron moulders, by which such defects might be discovered before the materials were incorporated into the car, the manufacturer's negligent failure to make such tests would be imputed to the transporting carrier, under the rule that the carrier is liable for all defects in his vehicle existing at the time of construction, as well as those which may exist afterwards, and be discovered on investigation.
2. Same—Res Ipsa Loquitur.—Where a passenger proved his injuries as the result of a breakage in one of the cars of a train in which he was riding, the carrier, in order to defeat a recovery, must show, not only that it was due to a cause or causes which the exercise of the utmost human skill and foresight could not prevent, but that, if the accident was due to a latent defect in the material or construction of the car, it could not have been discovered either by the carrier or the builders by the exercise of such care.
3. Same—Mixed Trains.—Carriers operating mixed trains for the carriage of passengers are under precisely the same duty as regards the safety of their cars from defects as where the passengers are carried only on passenger trains.

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4. Trial — Requested Instruction — Conformity to Issues. — A charge in an action for injuries to a passenger from a broken axle, regarding the assumption of additional risk by plaintiff when riding on mixed trains, should not have been given where there was no question of the ordinary additional risk on mixed trains involved in the case.

ALLAN D. COLE for appellant.

W. H. WADSWORTH and LEWRIHT BROWNING for appellees.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR— Reversing.

Appellee Chesapeake & Ohio Railway Company controls and operates a short branch line in Lewis and Carter counties, known as the "Kinniconick & Free Stone Railroad." It runs only mixed freight and passenger trains on the line. Appellant was a passenger on one of these trains. A loaded freight car of the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, which was being hauled in this train was derailed by a broken axle, it is said, wrecking the passenger coach in which appellant was riding, inflicting injuries upon her which she claims were painful and impaired her power to earn money. The axle broke because of a latent fault, a sand hole, caused by the sand used in moulding the axle being accidently taken into the molten metal. The spot occupied by the sand, if within the axle, is entirely undiscoverable by any kind of visual inspection, and in proportion to its area necessarily weakens the axle. If the derailment of the car in this instance was due to the circumstance of the defective axle, it illustrates just how dangerous such a defect may be. The question for decision on this point is: What was the extent

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of the carrier's duty with respect to a car forming part of a train on which it carried passengers?

The language usually employed in defining the measure of the carrier's duty is that "a common carrier of passengers is bound to provide for their safety so far as human care, skill, and foresight are capable of securing that end." But the question recurs, then: When is this duty discharged? Is a carrier which takes the car of another company into its passenger train excused from liability to its passenger resulting from hidden defects in such car when it shows that they were not discoverable by the ordinary methods of inspection available and practicable as to a car upon the tracks? Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141, was a case where a passenger had been injured by a defect in a Pullman car being hauled by the Pennsylvania Company in one of its trains. It sought to escape liability for the injury, upon the ground that it had no control over the car as to repairing it or keeping it in a safe condition, and particularly as to hidden defects in its construction. In the court's opinion, by Mr. Justice Harlan, it was said of the duty of the carrier: "These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required as to passengers to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the

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passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate; that is, sufficiently secure as to strength and other requisites for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. These doctrines to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, of their practical value, if carriers are permitted to escape responsibility upon the ground that the cars or vehicles used by them, and from whose insufficiency injury has resulted to the passenger, belong to others. * * * The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey." There is a very common custom of interchanging cars among railroads. The passenger has no option but to use the vehicles and the trains provided by the carrier for the transportation of the public. The railroad company may cause inspection to be made before putting the cars of another company into its trains, and, if it fails to do so, it will not be heard to say that the owner company was the one in fault in letting its car get into an unsafe condition. But here the defect in the visiting railway car was not observable by ordinary or even by extraordinary inspection after it came into appellee's custody. What, then, is the

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rule? We think that a carrier of passengers is answerable in no less degree for the safe condition of the cars of other companies which it is using than for its own cars. Its duty to its passengers cannot be made to shift upon any such consideration, becoming lighter when the carrier employs other vehicles for its service than its own. It ought to be held, and will be held, to the same degree of care as to all cars and locomotives in its train, whether it owns them or not.

The suggestion is made that under the Constitution and laws of this State carriers are bound to take the cars of connecting lines, and to haul them on equal terms with its own cars; and that as it has not the opportunity for other tests or examination than the conditions afford—the car standing upon the track—it ought not to be held accountable for not discovering defects that were not discoverable by such methods of examination. This would impose on the carrier, as we shall see further along, less responsibility as to such cars than the law imposes as to the carrier's own cars. Such a rule is not consistent with that exacting standard which the law out of its tender regard for human life has erected for the protection of the traveling public. As intimated in Pennsylvania Co. v. Roy, supra, the owner of the defective car might and doubtless would be liable to reimburse the carrier who was compelled to respond in damages to its passenger injured because of such defects. At any rate, as between the three, the passenger, the carrier, and the owner of the car, the passenger's safety and the carrier's supreme duty are the matters of main concern to the law. The tendency is to exact more care, and not less, of carriers of passengers.

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Hegeman v. Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517, was decided more than 50 years ago in the Court of Appeals of New York. There a passenger was injured by the car in which he was seated being wrecked through a defect in the axle. The company showed that it purchased the car from manufacturers in good repute, that it had been periodically inspected, and that it always appeared sound. The charge to the jury upon the trial was that although the defect was latent, and could not be discovered by the most vigilant external examination, yet, if it could be ascertained by a known test, applied either by the manufacturer or the defendant, the latter was liable. The court held there was no error in the instruction. It was there said: "It was said that carriers of passengers are not insurers. This is true. That they were not required to become melters of iron, or manufacturers of cars in the prosecution of their business. This also must be conceded. What the law does require is that they shall furnish a sufficient car to secure the safety of their passengers by the exercise of the 'utmost care and skill in its preparation.' They may construct it themselves, or avail themselves of the services of others; but in either case they engage that all that well-directed skill can do has been done for the accomplishment of this object. A good reputation upon the part of the builder is very well in itself, but ought not to be accepted by the public, or the law, as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skillfully exercised in the particular instance." In Sharp v. Gray, 9 Bing. 457, the carrier was held responsible for all defects in his vehicle which can be seen at the time of construction,

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as well as for such as may exist afterward, and be discovered on investigation. If not, he might buy ill constructed or unsafe vehicles, and his passengers be without remedy. The same doctrine was approved in a carefully prepared opinion in Treadwell v. Whittier, 80 Cal. 575, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. And such we think must be the rule. The carrier, in consideration of certain well-known and highly valuable rights granted to it by the public, undertakes certain duties toward the public, among them being to provide itself with suitable and safe cars and vehicles in which to carry the traveling public. There is no such duty on the manufacturer of the cars. There is no reciprocal legal relation between him and the public in this respect. When the carrier elects to have another build its cars, it ought not to be absolved by that fact from its duty to the public to furnish safe cars. The carrier cannot lessen its responsibility by shifting its undertaking to another's shoulders. Its duty to furnish safe cars is side by side with its duty to furnish a safe track, and to operate them in a safe manner. None of its duties in these respects can be sublet so as to relieve it from the full measure primarily exacted of it by law. The carrier selects the manufacturer of its cars, if it does not itself construct them, precisely as it does those who grade its road, and lay its tracks, and operate its trains. That it does not exercise control over the former is because it elects to place that matter in the hands of the manufacturer, instead of retaining the supervising control itself. The manufacturer should be deemed the agent of the carrier as respects its duty to select the material out of which its cars and locomotives are built, as well as in inspecting each step of their construction. If there

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be tests known to the crafts of car builders, or iron moulders, by which such defects might be discovered before the part was incorporated into the car, then the failure of the manufacturer to make the test will be deemed a failure by the carrier to make it. This is not a vicarious responsibility. It extends, as the necessity of this business demands, the rule of respondeat superior to a situation which falls clearly within its scope and spirit. Where an injury is inflicted upon a passenger by the breaking or wrecking of a part of the train on which he is riding, it is presumably the result of negligence at some point by the carrier. As stated by Judge Story, in Story on Bailments, section 601a: "When the injury or damage happens to the passenger by the breaking down or overturning of the coach, or by any other accident occurring on the ground, the presumption prima facie is that it occurred by the negligence of the coachman, and the onus probandi is on the proprietors of the coach to establish that there has been no negligence whatever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent; for the law will, in tenderness to human life and limb, hold the proprietors liable for the slightest negligence, and will compel them to repel by satisfactory proofs every imputation thereof." When the passenger has proved his injury as the result of a breakage in the car or the wrecking of the train on which he was being carried, whether the defect was in the particular car in which he was riding or not, the burden is then cast upon the carrier to show that it was due to a cause or causes which the exercise of the utmost human skill and foresight could not prevent. And the carrier in this connection must show,

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if the accident was due to a latent defect in the material or construction of the car, that not only could it not have discovered the defect by the exercise of such care, but that the builders could not by the exercise of the same care have discovered the defect or foreseen the result. This rule applies the same whether the defective car belonged to the carrier or not.

Able counsel for appellee contend that the rule in this State does not extend so far as is written above. No case has heretofore arisen in this State where the question was involved either as to the carrier's responsibility for the condition of cars not its own which it hauls in its trains, or as to defects occurring in the course of the manufacture of the cars constituing its trains. Nevertheless we will examine in this opinion the authorities relied upon by appellee. Kentucky Central R. R. Co. v. Thomas, 79 Ky. 160, 2 Ky. Law Rep. 114, 42 Am. Rep. 208, is cited. There the question was as to the duty of a railroad company, a common carrier, to equip its cars with Westinghouse air brakes At this day, less than 30 years after that case was decided, it may seem strange that a carrier of passengers was resisting the installment of that now indispensable appliance to railroad trains which has proved so valuable to both the carriers and the public. Yet in that case the plaintiff offered evidence conducing to prove that the Westinghouse air brake was more efficient in arresting the progress of a train than the brakes in use on the defendant's train on which the intestate was killed. The defendant objected to the evidence, and, it being admitted over its exceptions, that was assigned as error. Respecting the duty of railway carriers, the court laid down this rule, which we understand to be the same, differ-

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ently expressed, as is restated in principle in this opinion: "They are bound to provide a road, engines, and cars free from all defects which endanger the lives of passengers, and which might have been discovered by the closest and most careful scrutiny of competent men, and to employ competent and trustworthy persons to operate and manage their roads, engines, and cars, but are not liable for casualties which human sagacity cannot foresee, and against which the utmost prudence cannot guard." Louisville Railway Co. v. Weams, 80 Ky. 420, 4 Ky. Law Rep. 287, involved the degree of care required of a driver of a mule car on a street railway. And it was there stated: "The rule is that a carrier of passengers for hire must use the utmost care and skill which prudent men are accustomed to use under like circumstances." The instruction condemned in that case was this: "The defendant as a carrier of passengers for hire was bound, as far as human foresight and care would enable it, to carry the plaintiff with safety," etc. But this court in Davis v. Paducah Light & Ry. Co., 113 Ky. 267, 26 Ky. Law Rep. 135, 68 S. W. 140, extended the rule laid down in the Weams Case, supra. The instruction then under consideration reads: "* * * It was the duty of the defendant company to have provided safe cars in a safe condition in which for passengers to ride in so far as human foresight and judgment by recent inspection could enable the company to know, or in good faith to believe, the cars in good condition by being inspected by a competent employe." The court refused to approve a substitution of good faith for a safe car. Instead, Shearman & Redfield's Negligence, section 495, was cited with approval, that there was exacted from a common carrier for hire the utmost care and

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skill which prudent men are accustomed to use under similar circumstances. In that case the builder's negligence was not involved. The car had been allowed to fall into disrepair. In Louisville Ry. Co. v. Hartledge, 74 S. W. 742, 25 Ky. Law Rep. 152, also cited by appellee, the cause of the injury was not, so far as appears, in the condition of the car, but was some obstruction on the track. The court refused to reverse the judgment below, and did not undertake to define the full duty of the carrier to its passengers as to furnishing them safe cars in which to ride.

Finally, a question was made and submitted to the jury, respecting the assumption of additional risks by appellant in riding upon a mixed train. We do not think there was any place in this case for such an instruction. Carriers who operate mixed trains for carrying passengers are under precisely the same duty as regards the safety of their cars from defects as where they carry the passengers upon passenger trains. In Illinois Central v. Vinson, 74 S. W. 671, 25 Ky. Law Rep. 38, and C. & O. Ry. Co. v. Jordan, 76 S. W. 146, 25 Ky. Law Rep. 574, the instructions were predicated upon the evidence as to sudden jerkings of the trains, and in such cases there is an assumption by the passenger of such usual jerkings and jolts as are necessary and customary in starting and stopping prudently operated mixed trains; but no claim is made in this case for injury based upon such cause. The instruction should have been omitted.

The pleadings sufficiently present the questions discussed.

For the reasons given, the judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

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CASE 45.—PROCEEDINGS FOR THE ESTABLISHMENT OF A HIGHWAY IN BRECKINRIDGE COUNTY IN WHICH CERTAIN DAMAGES WERE AWARDED TO W. E. RHODES.—December 6.

Breckinridge County v. Rhodes

Appeal from Breckinridge Circuit Court.

WEED S. CHELF, Circuit Judge.

From a judgment dismissing the appeal the county through its county attorney appeals—Reversed.

District and Prosecuting Attorneys—Authority of County Attorney—Appeals.—Under Ky. Stats., 1903, sections 126, 127, 129, 978, 4303, requiring the county attorney to attend courts in his county, conduct all cases touching the interests of the county, oppose the allowance of all unjust claims, and authorizing appeals to the circuit court from judgments of the fiscal court in civil cases and to the circuit court from the decision of the county court in proceedings for establishing highways, etc., the county attorney may without order from the county or fiscal court appeal from an allowance of damages awarded to an owner over whose land a proposed highway is to run; section 127 not imposing any limitation on the authority of the county attorney.

GUS BROWN, County Attorney, for appellant.

The contention of appellant is that the county attorney may, in all cases where an appeal by law is permitted, make such appeal on his own motion from an order of the county court, without permission from, or order on the part of the county judge permitting him to do so.

AUTHORITIES CITED.

County of Jefferson v. Waters, 23 Ky. Law Rep., 669; Comth.

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v. Kimberlin, 8 Bush, 444; Montgomery County v. Tipton, 15 S. W., 249; Ky. Stats., sections 126, 127, 129, 978, 4303; Gen. Stats., section 6, art. 3, ch. 5; Civil Code, section 729.

MURRAY & MURRAY for appellee.

The appellee contends:

1. That the county attorney has, under the statutes, no authority to appeal without an order of the county court directing him to do so; or,

2. He should have awaited a rejection of said claim by the fiscal court, and by order of the fiscal court, if such action be taken by the fiscal court, forced the appellee to appeal; or

3. If the fiscal court should have allowed said claim, he should have, as provided by law, appealed from said allowance.

4. Or, he should have procured an order from the fiscal court directing him to appeal.

AUTHORITIES CITED.

Ky. Stats., sections 126, 127, 4303; Jefferson County v. Waters, 111 Ky., 286; Comth. v. Kimberlin, 8 Bush, 444; Montgomery County v. Tipton, 15 S. W., 249; Gen. Stats., art. 3, ch. 5, sec. 7.

OPINION OF THE COURT BY WM. ROGERS CLAY, Commissioner—Reversing.

Willis Green and others on the 30th day of April, 1907, filed in the county court of Breckinridge county their petition for the opening of a new road. By consent of the parties, a jury was waived and the question of damages accruing to those over whose land the proposed road was to run was submitted to the county court. This court awarded appellee W. E. Rhodes the sum of $850. The county attorney of Breckinridge county, believing that the allowance of $850 was excessive, appealed on his own motion, and without any order from the county or fiscal court, to the circuit court of Breckinridge county from so much of the order as allowed appellee the sum of $850.

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When the case came on for hearing before the circuit court, appellee moved to dismiss the appeal on the ground that the county attorney was not authorized by any order of the county or fiscal court to prosecute the appeal. Thereupon the circuit court entered an order dismissing the appeal, and, from that order, the county of Breckinridge is here on appeal.

For the purpose of getting the question involved fairly before us, it will be necessary to set out the following sections of the Kentucky Statutes of 1903:

"Sec. 126. Each county attorney shall attend all county and fiscal courts held in his county and conduct all cases and business in said court touching the rights or interests of the county, and oppose the allowance of all claims not legally presented or unjust, and give the court and the several county officers legal advice concerning any county business within the jurisdiction of any of them.

"Sec. 127. He shall attend the prosecution of all cases in his county in which the Commonwealth or the county is interested; and, when so directed by the county or fiscal court, institute or defend and conduct actions, motions and proceedings of every description, before any of the courts of this Commonwealth in which the county is interested, and shall in no instance take a fee or act as counsel in any case in opposition to the interests of the county. He shall also attend the circuit courts held in his county, and aid the Commonwealth in all prosecutions therein, and in the absence of an acting Commonwealth attorney, he shall attend to all Commonwealth's business in said courts."

"Sec. 129. He shall oppose the wrongful opening, alteration or discontinuance of any public road, and oppose the improper granting of tavern, merchant's

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and drug license, and may, if he thinks a license has been improperly granted, prosecute an appeal without security to the circuit court in the name of the Commonwealth."

"Sec. 4303. No appeal shall lie to the Court of Appeals from the decision of a county court ordering a new road to be opened, or refusing such an order, or ordering an alteration in a road, or refusing the same, or discontinuing a road, or refusing such discontinuance, allowing gates to be erected across a road, or refusing to allow the same, or abolishing such gates. But in all such cases, the party aggrieved may prosecute an appeal within sixty days by executing bond as required in other cases to the circuit court of the county, and the appeal shall be tried de novo; and from the decision of the circuit court either party may prosecute an appeal to the Court of Appeals, and the latter court shall have jurisdiction only of matters of law arising on the record of such cases."

"Sec. 978. Appeals may be taken to the circuit court from all orders and judgments of the fiscal or quarterly court in civil cases where the value in controversy is over fifty dollars, exclusive of interest and costs, * * * and in all other cases allowed by law."

From the above sections of the Kentucky Statutes, it will appear that the county attorney must oppose illegal claims and unjust allowances of public money; that he must give legal advice to the county officials; that he must prosecute all cases on behalf of the county; that he must oppose the wrongful opening, alteration, discontinuance of any public road, and the wrongful and improper granting of tavern, merchant's, or drug license, and may, if he thinks a

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license has been improperly granted, prosecute an appeal to the circuit court. It is the contention of counsel for appellee that the validity of the order opening the new road is not called in question; that the only question involved is the amount of damages allowed appellee; that, while the right of appeal is given by section 4303, that right is subject to the limitation prescribed under section 127, which gives authority to the county attorney to prosecute an appeal only in the event of an order from the county or fiscal court; that, as this appeal was prosecuted without any such order from either court, the circuit court properly dismissed the appeal. The county attorney is the legal representative of the county. He is also the chosen legal representative of the people to see that no illegal nor wrongful appropriation of the public funds of the county is made. For the purpose of carrying out the mandatory provisions of the Statutes, it is frequently necessary to call in question the action both of the county and fiscal courts. While these courts are separate, yet in a sense they are closely connected. The county judge, aside from constituting the county court, is a member of the fiscal court. The relations between the justices of the peace and the county judge, all of whom compose the fiscal court, are usually quite close, and the influence of each of these courts upon the other cannot be overlooked in determining this question. If appellee's contention be correct, the county attorney, although he believed that unjust claims had been allowed, could not properly protect the interests of the county, for the reason that neither the county court nor the fiscal court would authorize an appeal. Men in every public capacity desire their official acts to meet with public approval, and, for this reason,

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they might be slow in directing any one to take steps that in all probability would cast disapproval upon such acts. If, then, either the county or fiscal court acted upon a matter involving the interests of the county, and the county had no right of appeal, because neither of these courts would sanction an appeal, it would necessarily follow that in those cases, where an appeal was most necessary, the county would be in a helpless condition.

In discussing this question, it is not our purpose in the least to reflect upon the men constituting our county and fiscal courts, for we are of the opinion that in by far the greater number of the counties of this Commonwealth these men are conscientious, faithful, and efficient officers. Now and then, however, there are officers who do not perform their duties as they should, or perform them in such a manner as to be subversive of the true interests of the people. For the purpose of meeting the latter condition, no limitation should be put upon the rights of the courts to review their action, unless it appears from the Statutes that the Legislature plainly intended it. To hold that the courts making the error are vested with the sole power of determining whether or not an appeal should be prosecuted from their judgment would virtually be to deny the right of appeal in the very cases where the interests of the county demand it. If the county attorney, believing firmly that the action of the county or fiscal court was improper, had to turn to these courts and ask the right to prosecute an appeal for the purpose of reviewing their action, we fear that, instead of being the legal representative of the county and its people, he would become the mere tool of the county or fiscal court. It may be contended that to allow the county

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attorney to prosecute an appeal on his own motion would be vesting in him an authority that would be dangerous, but it is hardly probable that he would undertake an appeal, unless he conscientiously believed that such act on his part was due to the people of his county. It is not likely that he would be actuated by any other motive, for the law prescribes no additional remuneration for such labors. However, if he should be actuated by improper motives, no harm could be done either the county or fiscal court, for the questions involved would be finally determined by this court.

Counsel for appellee relied upon the case of Montgomery County v. Tipton, 15 S. W. 249, 12 Ky. Law Rep. 847. In that case the court said: "There is no provision requiring the county attorney to oppose the opening of a new road, and, while we think such a duty is incumbent upon him when the county court determines the necessity for the road and establishes it, no appeal should be allowed unless directed by the county court, conceding that the right of appeal exists in behalf of the county. The statute provides that it shall be the duty of the county attorney, when directed by the county court, to institute and conduct suits, motions, and prosecutions of every description before any of the courts of this Commonwealth in which the county is interested. In this case the county court wants the road established, and, in our opinion, the appeal in such a case should be dismissed." Prior to this decision, this court, in Commonwealth v. Kimberlin, 8 Bush, 444, laid down the following rule: "Any private citizen who will be affected by a proposed alteration in a public road may make himself a party to the proceeding, and, if aggrieved by the final order of the county court,

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prosecute an appeal to the circuit court. In this case the parties directly interested, those over whose lands the road was to be run, consented to the alteration, and it was only the general public that could be injured by the change. This general public it is made by law the duty of the county attorney to represent. In the discharge of this duty, he opposed the alteration in the county court, conceiving the general public to be aggrieved by the action of the court. He prayed in the name of the Commonwealth an appeal to the circuit court. If the general public has been aggrieved, of which fact its chosen representative, the county attorney, must be allowed to be the judge, there can be no good reason why it should be denied the right of appeal, and there is nothing in the statutes authorizing appeals in this class of cases indicating any such intention upon the part of the lawmaking power." We confess that the reasoning of this latter case appeals more strongly to us than that of the case of Montgomery County v. Tipton, supra. In the recent case of Jefferson County v. Waters, 111 Ky. 286, 23 Ky. Law Rep. 669, 63 S. W. 613, the court held: "The right to institute, defend, and conduct actions, motions, and proceedings of every description includes the right to prosecute an appeal from the action of a court as to a matter in which the county is interested, when directed by the county court." In discussing the question, however, this court used the following language: "Section 126 makes it the duty of the county attorney to oppose the allowance of all claims not legally presented or unjust, and we are of the opinion that from this provision the authority of the county attorney is implied to prosecute an appeal from an order allowing a claim against the county. If we are in error in this

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conclusion, then it is prefectly plain that he has such authority when the county court orders him to do so." In that case the county court ordered the county attorney to take the appeal, and, of course, the same question involved in this case was not there involved. As neither of the courts in this case authorized the appeal, the direct question is before us whether the county attorney can prosecute an appeal without such authority. We now adopt the above language of this court in Jefferson County v. Waters, supra, and hold that the authority of the county attorney is implied to prosecute an appeal in all cases where an appeal is allowed by law; and, in reaching this conclusion, we do not think that section 127 imposes any limitation upon the authority of the county attorney. From the language therein used, it is apparent to us that the purpose of that section was to make it his mandatory duty to take appeals when directed by either the county or fiscal court. In other words, if either court should enter an order directing an appeal, it is made his absolute duty to comply with that order. We do not believe, from the language used, that the Legislature intended that, in the absence of such an order, he could not, as the legal representative of the county, protect its interests by prosecuting an appeal.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

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CASE 46.—ACTION BY THE COUNTY ATTORNEY OF JEFFERSON COUNTY IN THE NAME OF THE COUNTY AGAINST ARTHUR PETER AND OTHERS, MEMBERS OF THE FISCAL COURT, TO ENJOIN THEM FROM APPROPRIATING COUNTY FUNDS TO SECURE A POLITICAL CONVENTION IN THE CITY OF LOUISVILLE.—December 6.

Jefferson County v. Peter, &c.

Appeal from Jefferson Circuit Court.

Chancery Branch (1 Div.) SHACKELFORD MILLER, Judge.

From a judgment dismissing the petition plaintiff appeals—Reversed.

Counties—Fiscal Courts—Appropriations.—The fiscal court has no power to make appropriations out of county funds for any purpose, except as provided by Act March 21, 1906 (Acts 1906, p. 342, ch. 73), amending Ky. Stats., 1903, section 1840, and hence can not appropriate such funds to secure a convention to be held in the county; that object not being within the statutory authority to advertise the resources of the county.

JOSEPH SELLIGMAN, Attorney for appellant.

1. The appropriation is not for a public purpose. Section 171 of the Constitution provides: Taxes shall be levied and collected for public purposes only.

2. The purpose, even though public, is not within the meaning of said act of March 21, 1906, and is therefore not a purpose for which fiscal courts are authorized to expend money.

3. The resolution proposes to expend money through other than a public agency in violation of section 179 of the Constitution.

4. Jefferson county has not sufficient funds on hand or in

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process or prospect of collection out of which to pay the appropriation and its allowance will cause the county to become indebted to an amount exceeding the income and revenue for the year for which the appropriation is made, in violation of section 157 of the Constitution.

AUTHORITIES CITED.

Barbour, Sheriff, etc., v. Louisville Board of Trade, 82 Ky., 845; Comth. v. Makibben, etc., 90 Ky., 384; City of Newport v. Comth., 106 Ky., 434; Cooley on Taxation (3d Ed.), vol. 1, p. 187, et seq; Norman, Auditor, v. Ky. Board, etc., 93 Ky., 537; Hager, Auditor, v. Ky. Children's Home, 119 Ky., 235; House of Refuge v. Lexington, 112 Ky., 171; Hager, Auditor, v. Ky. Live St. Assn., 120 Ky., 125; Acts 1891-2-3, chs. 132-158; Constitution, sections 171, 177, 179, 157.

HARDIN H. HERR for appellee.

POINTS AND AUTHORITIES.

1. This case involves the construction of the act of the General Assembly of March 21, 1906, Acts of 1906, ch. 73 p. 342. Under that act, a fiscal court can appropriate money to aid in securing a National Democratic convention in its county seat. (Norman v. Ky. Board of Managers, 93 Ky. 537; Acts 1904, p. 1; Daggett v. Colgan, 92 Cal., 53.)

2. Contemporaneous construction is entitled to great weight. (Collins v. Henderson, 2 Bush, 92; Aetna Ins. Co. v. Coulter, 115 Ky., 792.)

3. Other like appropriations have been upheld. (Ky. Live Stock Breeders' Association v. Hager, 120 Ky., 125.)

4. A county stands upon the same footing as the State in such appropriations when the State authorizes the appropriation to be made by the county. (Lewis Sutherland on Statutory Construction, section 647; 2 Cyc., 512; Shelby County v. Tenn. Expo., 96 Tenn., 635, s. c. 33 L. R. A., 717; Douglas v. Connell, 53 Neb., 556; Lund v. Chippewa Co., 93 Wis., 640; Minneapolis v. Janie, 86 Minn., 114; Hager, Auditor, v. Ky. Childrens' Home Society, 119 Ky., 235; House of Reform v. Lexington, 112 Ky., 171; Troutman v. Hays, 101 S. W., 976; Overall v. Madisonville, 102 S. W., 278.)

5. An appropriation pro tanto is valid. (Whaley v. Comth., 110 Ky., 154; Field v. Stroube, 103 Ky., 114; Wathen v Young, 103 Ky., 36; City of Providence v. Providence Lighting Company, 91

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S. W., 664, s. c. 28 Ky. Law Rep., 1015; Russ v. Comth., 210 Pa., 544; Orphan Society of Lexington v. Fayette County, 6 Bush 413.)

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

The fiscal court of Jefferson county on November 18, 1907, made the following order: "Whereas, the citizens of Louisville are making an effort to secure the National Democratic Convention to be held in the city of Louisville during the year 1908; and whereas, it will require the expenditure of a large sum of money to secure said convention; and whereas, it is believed that if said convention is secured for the city it will advertise and develop the resources of Jefferson county: Now, therefore, be it resolved that there be appropriated out of the county levy fund the sum of ten thousand ($10,000.00) dollars; said sum to be paid to L. C. Murray, treasurer of the Citizens' Committee, to secure the Democratic National Convention for Louisville for 1908. The said sum is not to be paid until the governing authorities decide to hold said convention in the city of Louisville." Thereupon this suit was brought by the county attorney, in the name of Jefferson county, against the members of the fiscal court, to enjoin them from carrying out the order. The circuit court dismissed the petition, and the county appeals.

The only question we deem it necessary to consider is whether the fiscal court has authority to make an appropriation of the county funds for the purpose indicated. The fiscal court is a tribunal of limited powers, and has no jurisdiction to appropriate county funds, except as it is authorized by law to do so. Morgantown Deposit Bank v. Johnson, 108 Ky. 507, 22 Ky. Law Rep. 210, 56 S. W. 825; Jefferson County v.

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Young, 120 Ky. 456, 30 Ky. Law Rep. 1209, 86 S. W. 985; Mitchell v. Henry County, 100 S. W. 220, 30 Ky. Law Rep. 1051. The powers of the fiscal court, as defined by the act of March 21, 1906, amending section 1840, Ky. St. 1903, are as follows: "The fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair necessary public buildings, secure a sufficient jail and a comfortable and convenient place for holding court at the county seat; to erect and keep in repair bridges and other structures and superintend the same; to regulate and control the fiscal affairs and property of the county; to make provisions for the maintenance of the poor and provide a poorhouse and farm and provide for the care, treatment and maintenance of the sick, poor, and provide a hospital for said purpose, or contract with any hospital in the county to do so, and provide for the good condition of the highways in the county, and to appropriate county funds to make provision to secure immigration into the county, and to advertise the resources of the county, and to appropriate county funds for the benefit of colleges and for infirmaries for the sick located in the county, and to execute all of its orders consistent with the law and within its jurisdiction, and shall have jurisdiction of all such other matters relating to the levying of taxes as is by any special act now conferred on the county court of levy and claims." Acts 1906, p. 342, c. 73.

It is insisted for the fiscal court that it has authority to make an appropriation to secure the National Democratic Convention in Louisville by reason of the power given it in the act "to appropriate county funds, to make provision to secure immigration into the county, and to advertise the resources of the

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county." It is said that the bringing of a large crowd to Louisville to the Democratic Convention would advertise the resources of the county. We cannot concur in this construction of the statute. If the fiscal court may make an appropriation to secure the holding of a political convention of one political party in the county, it may make appropriations to secure the holding of the convention of other political parties, or of church conventions, educational meetings, and any other gathering that would bring people to the community temporarily. If money may be appropriated by the fiscal court for such purposes, it cannot be confined to national conventions, but must include district or State conventions as well. Camp meetings will draw sometimes a great many people to the community, and so will one of the large shows that travel about the country. If the fiscal court, under the power to advertise the resources of the county, may make an appropriation to secure the holding of such things in the county, then it is hard to say what the fiscal court may not do under the provision of this act. The object in holding a national convention is to nominate a candidate for President and Vice President of the United States and to make a party platform. The persons who come to such a convention come for political purposes as a rule, not to examine the resources of the county in which the convention is held. The meaning of the act is not that the fiscal court may appropriate the county funds to make provision for anything which will indirectly or remotely secure immigration into the county and advertise the resources of the county to some extent. Its meaning is that the fiscal court may appropriate the funds of the county to make provision for those things which directly and proxi-

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mately advertise the resources of the county or help to secure immigration into it. The fiscal court may print and circulate advertisements of the resources of the county to secure immigration into it. It may send out agents for this purpose, or make appropriations to exhibitions of the resources of the county, or do other like things, the primary and direct purposes of which is to secure immigration into the county or advertise its resources. The resources of the county include its land, timber, coal, crops, improvements, railways, factories, and everything that goes to make up its wealth or to render it desirable. All these the fiscal court has power to advertise; but the means must be germane to the end. The advertisement must be its primary purpose. Things done for other purposes cannot be sustained under this power because they may indirectly or incidentally advertise the resources of the county.

In view of the history of the State, the legislative purpose in the act is not difficult to be seen. There has been little immigration into Kentucky. Her resources have not been heralded to prospective immigrants. The tide of immigration has poured to the West without reaching us. The purpose of the Legislature was to enable the fiscal courts to advertise the resources of their counties and thus attract immigration. Things that are germane to this end the fiscal court may do; but they must be naturally and directly germane to the end, not indirectly or remotely. A manufactory or a mine might attract immigration to a county; but it could not be maintained that the fiscal court may appropriate the funds of the county to secure the location of a factory, or the opening of a silver or lead mine, on the idea that it would secure immigration into the county or bring

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it into public notice. Taxes may be levied only for public purposes. They cannot be levied for private purposes, although these may incidentally and indirectly benefit the public. The use itself must be public. Laws authorizing the appropriation of public funds will not be extended by construction beyond the natural and fair meaning of the words used. The powers of the fiscal court are derived entirely from the statute. Previous to the act of 1906, its powers were confined to providing for the public buildings, public highways, the poor of the county, and other like matters. It has been a legislative policy from the foundation of the Commonwealth to define the powers of these tribunals. The act of 1906 is to be read in the light of this legislative policy. It is a grant of power for certain purposes. Power not granted is withheld; and to bring any appropriation within this clause of the act it must be for something which is primarily, in and of itself a provision to secure immigration into the county or to advertise the resources of the county. In 2 Smith on Municipal Corporations, section 1456, the rule is thus stated: "Since the power to tax is a delegated authority, it is always assumed that the State has given all it intended to be exercised, and the grant must be strictly pursued. The current of authority is strongly against the doctrine of implied powers of municipal taxation, and statutes, increasing the burdens of taxation must be strictly construed." We therefore conclude that the fiscal court was without authority to make the appropriation in question and the circuit court erred in sustaining the defendant's demurrer to it.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

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CASE 47.—ACTION BY HENRY PRINZ AGAINST THE BOARD OF PARK COMMISSIONERS OF THE CITY OF LOUISVILLE FOR DAMAGES FOR PERSONAL INJURIES.—December 6.

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135 575

Board of Park Commissioner v. Prinz

Appeal from Jefferson Circuit Court; Common Pleas Branch; Second Division.

MATT O'DOHERTY, Circuit Judge.

Judgment for plaintiff, defendant appeals—Reversed.

1. Municipal Corporations—Maintenance of Public Parks—Authority.—Public parks, maintained without gain, are not only exempt from taxation, but may be created and maintained by taxation, they being public places, established for public purposes; and the right of a city to support by taxation public parks rests on its duty to maintain the public health.
2. Same—Torts—Liability.—In the absence of a statute authorizing it, an action will not lie against a municipality for the neglect of a public duty imposed on it for the benefit of the public or for the personal tort of any of its officers or agents in the performance of such public duty.
3. Same.—In the absence of a statute authorizing it, an action will not lie against a board elected by the voters of a city, with authority to control the public parks supported by taxation, for the negligence of its employes.
4. Same.—A municipal corporation is not responsible for the misdoing of persons in charge of its police or fire departments.

KOHN, BAIRD & SPINDLE, S. E. SLOSS and ROBERT L. GREENE, Attorneys for appellant.

The sole question, for the decision of the court on this appeal, is: Can the board, in the absence of a statute, be held liable for

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the negligence of its servants and employes? We contend that it can not, because,

1. It is a governmental agency, and therefore is not suable in tort in the absence of a statute making it liable.

2. If not strictly governmental in its function it is at least charitable, subsists at the public expense, is not operated for profit, and its properties and funds constitute a sacred trust for specific public uses, among which liability in tort is not mentioned. The contention of the appellee and the decisions of the trial judge is to the effect that the case at bar is governed by the principle of the cases of Hauns v. Central Ky. Lunatic Asylum, 103 Ky., 562; Central Ky. Lunatic Asylum v. Hauns, 23 Ky. Law Rep., 1016; Bank of Hopkinsville v. Western Ky. Lunatic Asylum, 108 Ky., 357.

We shall consider these propositions in this order:

1. By reviewing the Kentucky cases with a view of discovering therefrom the principle to be applied to the case at bar, as well as the precedents for the maintenance of this action.

2. By distinguishing the case at bar and its principle and precedents from the case of Hauns v. Central Asylum, 103 Ky., and other cases of like kind.

3. We shall consider the case in principle and precedent as outlined by decisions of other States.

AUTHORITIES CITED (Kentucky Cases).

Warax v. Railroad, 72 Fed., 637; McDonald v. City of Louisville, 24 Ky. Law Rep., 271; City of Owensboro v. Comth., 105 Ky., 344; City of Lexington v. Ky. Chautauqua Assembly, 24 Ky. Law Rep., 1568; Prather v. Lexington, 13 B. Monroe, 559; Ward v. City of Louisville, 16 B. Mon., 184; Patch v. Covington, 17 B. Mon., 722; Pololck's Admr. v. Louisville, 13 Bush, 221; Greenwood v. Louisville, 13 Bush, 226; James' Admr. v. Harrodsburg, 85 Ky., 191; Downing v. Mason, 87 Ky., 208; Jolly's Admr. v. Hawesville, 89 Ky., 279; Williamson v. Louisville Industrial Schools of Reform, 95 Ky. 251, 23 L. R. A. 200; Hite v. Whitley County Court, 91 Ky., 168; Wheatly v. Mercer, 9 Bush, 704; Henderson v. City of Covington, 14 Bush, 312; Comth. v. Boyle County, 24 Ky. Law Rep., 234; Sinkhorn v. Lexington, etc., Co., 23 Ky. Law Rep., 1479; Having v. City of Covington, 25 Ky. Law Rep., 1617; Twyman v. City of Frankfort, 25 Ky. Law Rep., 1620; Dillon on Municipal Corporations, sections 977, 989, 981-2; City of Richmond v. Long's Admr., 17 Grattan, 375; Shewbourne v. Yarbo Co., 21 Cal., 113; Taylor v. City of Owensboro, 98 Ky., 271; McGraw v. Town of Marion, 98

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Ky., 673; Dudley v. City of Flemingsburg, 24 Ky. Law Rep., 1804; Sandusky v. Central City, 22 Ky. Law Rep., 669; Davis v. City of Middlesborough, 22 Ky. Law Rep., 415; City of Henderson v. McClain, 102 Ky., 402; Gross v. Ky. Board of Managers of the World's Exposition, 105 Ky., 840; Herr v. Central Ky. Lunatic Asylum, 97 Ky., 458; Lehman v. Beeler, 24 Ky. Law Rep., 174; Henderson County Board of Health v. Ward, 107 Ky., 477; Clayton v. City of Henderson, 103 Ky., 228; City of Paducah v. Allen, 111 Ky., 361; Bank of Hopkinsville v. Western Asylum for the Insane, 108 Ky., 257.

DECISION OF OTHER STATES.

Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Hall v. City of Concord, 52 Atl., 864; Colwell v. City of Waterbury, 57 L. R. A. 218; Connolly v. City of Nashville, 100 Tenn. 262, 46 S. W. 565; Maxamillian v. Mayer, 62 N. Y., 160; Edgerly v. Concord, 67 N. H., 8; Condiet v. Jersey City, 46 N. J. Law, 157; Steele v. Boston, 128 Mass., 583; Clark v. City of Waltham, 128 Mass., 567; Lincoln v. Boston, 148 Mass. 580, 12 Am. St. Rep. 601; Corning v. Saginaw, 40 L. R. A., 526; Hughes v. County of Monroe, 147 N. Y. 39, L. R. A.

BENNETT H. YOUNG for appellee.

POINTS AND AUTHORITIES.

1. The board of park commissioners is an annex or an adjunct to the city of Louisville. (Ky. Stats., sections 2840, 2843, 2855, 2841; Gibbs v. Board, 99 Ky., 490; Orvis v. Board of Park Commissioners, 88 Iowa 674, s. c. 56 N. W. 294; Louisville v. Park Commissioners, 112 Ky., 415; Quick v. Board, 20 Ky. Law Rep., 1457; Meddis v. Board of Park Commissioners, 19 Ky. Law Rep., 817; Napier v. Brooklyn, 58 N. Y. S., 506; Board of Park Commissioners v. DuPont, 110 Ky., 743.)

2. Even if this is not so, at the most the board of park commissioners of the city of Louisville is a municipal corporation. (West Chicago Park Commissioners v. Chicago, 152 Ill., 392.)

3. At the common law municipal corporations were liable for torts. (Louisville v. Kuntz, 104 Ky., 584; Louisville v. Siebert, 21 Ky. Law Rep., 328; Louisville v. Bailey, 25 Ky. Law Rep. 6, s. c. 74 S. W. 688; Sheldon v. Kalamazoo, 24 Mich., 385; Kavanaugh v. Brooklyn, 38 Barb., 237; Logansport v. Wright, 25 Ind., 515; Dillon on Municipal Corporations, p. 731; McGraw v. Marion,

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98 Ky., 673; Clayton v. Henderson, 103 Ky., 228; 15 Am. & Eng. Ency. of Law, 1141; Teague v. Flemingsburg, 109 Ky., 746; Norris v. Louisville, 111 Ky., 904; Owensboro v. Knox, 67 S. W. 191, s. c. 25 Ky. Law Rep., 680; Louisville v. Keher, 79 S. W. 270, s. c. 23 Ky. Law Rep. 2003; Williams' Municipality Liability for Tort, sections 11, 24; Shindle v. Covington, 1 Bush, 617; Shearman & Redfield on the Law of Negligence, section 355, 5th Ed.; Noble v. Richardmond, 31 Grattan 271, s. c. 31 Am. Rep. 726; Beach on Public Corporations, section 756; Edwards v. Town of Pocahontas, 47 Fed. Rep., 268; Barnes v. District of Columbia, 91 U. S., 540; Moulton v. Scarborough, 71 Mo. 267, s. c. 36 Am. Rep. 308; 20 Am. & Eng. Ency. of Law, p. 1196; Fugate v. Somerset, 97 Ky., 48; Henderson v. White, 20 Ky. Law Rep., 1525; Maysville v. Guilfogle, 110 Ky., 670.)

4. The following cases are distinguished from the case at bar McDonald v. Louisville, 113 Ky., 425; Owensboro v. Comth., 105 Ky., 344; Lexington v. Ky. Chautauqua Assembly, 24 Ky. Law Rep., 1568; Prather v. Lexington, 12 B. M., 559; Ward v. Louisville, 16 B. M., 184; Patch v. Covington, 17 B. M., 722; Pollock v. Louisville, 13 Bush, 221; Greenwood v. Louisville, 13 Busn, 226; James v. Harrodsburg, 85 Ky., 191; Downey v. Mason Co., 87 Ky., 208; Jolly's Admr. v. Hawesville, 89 Ky., 279; Williamson v. Louisville Industrial School of Reform, 95 Ky., 251; Hite v. Whitley Co., 91 Ky., 168; Whitley v. Mercer, 9 Bush, 704; Henderson v. Covington, 14 Bush, 312; Comth. v. Lexington Turnpike Co., 112 Ky., 205; Sinkhorn v. Lexington Turnpike Co., 112 Ky., 205; Having v. Covington, 78 S. W. 431, s. c. 25 Ky. Law Rep., 1617; Taylor v. Owensboro, 98 Ky., 271; Dudley v. Flemingsburg, 24 Ky. Law Rep., 1804; Sandusky v. Central City, 22 Ky. Law Rep., 669; Davis v. Lebanon, 108 Ky., 688; Bean v. Middlesboro, 22 Ky. Law Rep., 415; Twyman v. Frankfort, 78 S. W. 446, s. c. 24 Ky. Law Rep., 1620; Henderson v. Winstead, 109 Ky., 328; Hall v. Concord, 61 N. H., 367; Conley v. Nashville, 100 Tenn., 262; Maxmilian v. Mayor, 62 N. Y., 160; Condeit v. Jersey City, 46 N. J. Law, 157; Steele v. Boston, 128 Mass., 583; Clark v. Waltham, 128 Mass., 567; Lincoln v. Boston, 148 Mass., 578; Hughes v. Monroe Co., 147 N. Y., 49; LaClef v. Concordia, 41 Kas. 323, s. c. 13 Am. St. Rep. 285; Curren v. Boston, 151 Mass., 505; Ulrich v. St. Louis, 112 Mo., 138; Mell v. Workman, 67 Fed. Rep., 347 (this case has been reversed by the Supreme Court, 179 U. S.); Kas. City v. Laymon, 57 Fed. Rep.; Hill v. Boston, 122 Mass. 244, s. c. 24 Am. Rep. 332; Benton v. Boston City Hospital, 140 Mass. 13, s. c. 54 Am. Rep. 436; Richmond v. Long, 17 Gratt. 375, s. c. 94 Am. Dec. 461, 464; Shadbourne v. Yube Co.,

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21 Cal., 133; McDonald v. Mass. Hospital, 120 Mass. 432, s. c. 21 Am. Rep. 529; Perry v. The House of Refuge, 63 Md. 320, s. c. 52 Am. Rep. 495; Maria v. Eastern Hospital, 97 Va., 507; Maurtaugh v. St. Louis, 44 Mo., 479; Downs v. Harbor Hospital, 101 Mich., 555; Edgerly v. Concord, 59 N. H., 341; New Kiowa v. Craven, 46 Kas. 114, s. c. 26 Pac. 426; Ham v. Mayor, 70 N. Y., 459; Lane v. Woodberry, 58 Iowa, 462; Barbour v. Ellsworth, 67 Me., 294; Burrell v. Augusta, 78 Me., 118; Overhoser v. National Home, 68 Ohio, 236; Fisher v. Boston, 104 Mass., 87; Macad v. New Haven, 40 Conn., 72; Ogg v. Lansing, 35 Iowa 496, s. c. 14 Am. Rep. 499; Calwell v. Waterbery, 74 Conn., 568; Corning v. Saginaw, 116 Mich., 74; Warax v. Cincinnati R. R. Co., 72 Fed. 627.

5. Every word of a statute must be given effect. (Broom's Legal Maxim, pp. 569, 583.)

6. Under section 242 of the Constitution of Kentucky, quasi corporations and municipal corporations have been held liable for damages to property. However, that section has no application to this case. (Henderson v. McClain, 102 Ky., 204; Paducah v. Allen, 111 Ky., 361; Laymon v. Beeler, 113 Ky., 221.)

7. Where a statute provides that a corporation can sue and be sued, even a governmental corporation can sue and be sued without any qualification or exception. Under that state of case governmental institutions are liable for the torts of their servants and agents. (Hauns v. Central Ky. Asylum, 103 Ky., 562; Herr v. The Asylum, 110 Ky., 283; Gross v. The Board of Managers, 106 Ky., 840; Herr v. Central Ky. Asylum, 97 Ky., 458; Henderson Co. Board of Health v. Ward, 107 Ky., 482; Bank of Hopkinsville v. The Western Ky. Asylum, 108 Ky., 358; Central Asylum v. Hauns., 23 Ky. Law Rep., 1081; Bassett v. Fish, 75 N. Y., 313.)

8. Even if the board of park commissioners is a charitable corporation under a statute, which says "and to meet the expenses of the board," the corporation can be held liable for torts of their servants and agents. (Thompson on Corporations, sections 6363-64-65, and authorities there cited; Workman v. Mayor, 179 U. S., 552.)

9. Parties running a steam roller on a highway are liable to the party injured if it frightens a horse and causes him to throw out the driver of a wagon to which he is attached, and injure him. (Sherman & Redfield on the Law of Negligence, section 355, 5th Ed.; 1 Tomp. Neg., section 1257; Stanley v. Davenport, 54 Iowa 463, s. c. 37 Am. Rep. 216; Watkins v. Redmon, 2 Frost & F., 269; Young v. New Haven, 39 Conn., 436; Mullen v. Village of Glen Falls, 42 N. Y. S., 113 Dill Mun. Corp., section 955; Paine v.

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Rochester, 13 N. Y. Supp., 180; Turner v. Buchanan, 82 Ind., 147; Overson v. Grafton, 75 N. W., 676, N. Dakota.)

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Appellee brought suit against appellant to recover damages for injuries sustained by the negligence of its employes in the operation of a steam roller used by it. There is no dispute about the facts. The single question presented is whether or not appellant, in the absence of a statute imposing such liability, is responsible for the negligence of its employes.

The board of park commissioners are elected by the voters of the city to manage and control the public parks of the city, and have the right to contract and be contracted with, sue and be sued. The powers of the board are confined exclusively to the care and maintenance of the parks, and the duties incident thereto. The parks of the city are public places, established either by gift or purchase, and maintained by taxation. No gain or profit, either to the individual or the city, is derived from them. It is the contention of appellant that, in the absence of statutory authority, an action will not lie by an individual against a public corporation or body charged solely with the performance of public duties to recover damages for the personal misconduct or negligence of its agents or servants. Appellee's position is that the board of park commissioners being a mere adjunct of the city, created by statute for the purpose of performing duties that the city might exercise through other agencies, or in other ways, the city would be liable for the tort complained of, and so may an action be maintained against the board of

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park commissioners who are vested with the authority to sue and be sued as an independent corporation. The question involved and kindred ones have been the subject of much discussion by courts and text-writers, and it is difficult to reconcile the adjudged cases or reach a satisfactory conclusion from the authorities that have treated of the subject; but we will endeavor to solve the problem presented by the application of a few principles that seem to be generally recognized as correct and that have been applied in more than one case by this court. In disposing of the case we will treat it as if the parks were managed and controlled by the city without the intervention of the subsidiary corporation styled the board of park commissioners, because, if the city would be liable, so would the board of park commissioners, as it is merely an agency of the city created by law to exercise supervision and control over the parks.

The property held in trust by the board of park commissioners for the use of the public generally is not the subject of taxation. This was expressly decided by this court in the case of City of Owensboro v. Commonwealth, 105 Ky. 344, 20 Ky. Law Rep. 1281, 49 S. W. 320, 44 L. R. A. 202, and that parks may be acquired by cities, and taxes imposed for their purchase and care, was decided in City of Lexington v. Kentucky Chautauqua Assembly, 114 Ky. 781, 24 Ky. Law Rep. 1568, 71 S. W. 943. It may therefore be regarded as settled in this jurisdiction that public parks, maintained and managed without corporate or individual gain or profit, are not only exempt from taxation, but may be created and maintained by taxation. Hence they are essentially public places established for purely public purposes. The right of the city to support public parks by taxation

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is rested upon the ground that the municipal authorities are charged with the duty of maintaining the public health, and that parks where exercises and recreation can be indulged in, and pure and clean air breathed, contribute largely to the health of the community. Viewing the matter from this standpoint, the parks of the city occupy towards it and its inhabitants the same relation as do hospitals and other public institutions useful and necessary in the preservation of the health, safety, and morals of the people. And although there is conflict in the authorities, the decided weight of the adjudged cases favors the view that neither municipal corporations nor bodies such as appellant, when exercising exclusively public functons enjoined by law for the benefit of the general public, are liable to suit for the personal tort or negligence of an agent, servant, or employe. Some of these cases put the exemption upon the ground stated in Williamson v. Louisville Industrial School of Reform, 95 Ky. 251, 15 Ky. Law Rep. 629, 24 S. W. 1065, 23 L. R. A. 200, 44 Am. St. Rep. 243, where, in an action for tort by a person injured by one of its employes, the court said it was a charity, its purpose being the reformation and training of youths committed to its care, and as such it was an agency of the State exercising, although in a limited degree, governmental functions, and its funds could not be diverted from their intended beneficent purposes by judgments for damages, and this was approved in Leavell v. Western Ky. Asylum, 91 S. W. 671, 28 Ky. Law Rep. 1129, 4 L. R. A. (N. S.) 269. Other cases are rested upon the broader ground that public corporations are not responsible for the personal torts or negligence of their officers, agents, or employes committed in the exercise of acts or duties the

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corporation is required to discharge, or while performing some service necessary to the fulfillment of its obligations to the public. And so, in Having v. City of Covington, 78 S. W. 431, 25 Ky. Law Rep. 1617, where it was sought to recover damages against the city for the wrongful acts of its agents in assaulting Having, who was afflicted with a contageous disease, and incarcerating him by violence and against his consent in a house that was totally unfit for human habitation, the court, in denying the right of recovery, said: "There are two general principles underlying the administration of government of municipal corporations. The one is that a muncipal corporation in the preservation of the peace, public health, maintenance of good order, and the enforcement of the laws for the safety of the public, possesses governmental functions and represents the State. The other is where the municipal corporation exercises those powers and privileges conferred for a private, local or merely corporate purpose, and peculiarly for the benefit of the corporation. Under the former, the city is not liable for the torts of its officers or agents; under the latter, it is." In Twyman v. Board of Council of City of Frankfort, 117 Ky. 518, 25 Ky. Law Rep. 1620, 78 S. W. 446, 64 L. R. A. 572, the court, in deciding adversely to the claims of Twyman, who sought a recovery on grounds similar to those stated in the Having case, supra, said: "So far as municipal corporations of any class and however incorporated exercise powers conferred upon them for purposes essentially public, purposes pertaining to the administration of general laws made to enforce the general policy of the State, they should be deemed agencies of the State, and not subject to suit for an act or omission occurring while in the

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exercise of such power, unless by statute the action is given. In so far, however, as they exercise powers not of this character, voluntarily assumed powers intended for the private advantage and benefit of the locality and its inhabitants there seems to be no sufficient reason why they should be relieved from liability to suit and measure of actual damage to which an individual or private corporation exercising the same powers for purposes essentially private would be liable." The distinction recognized in the foregoing cases, and which was firmly established long before they were written, has been frequently applied by this court. Taylor v. City of Owensboro, 98 Ky. 271, 32 S. W. 948, 17 Ky. Law Rep. 856, 56 Am. St. Rep. 361; Dudley v. City of Flemingsburg, 115 Ky. 5, 24 Ky. Law Rep. 1804, 72 S. W. 327, 60 L. R. A. 575, 103 Am. St. Rep. 253; Bean v. City of Middlesboro, 57 S. W. 478, 22 Ky. Law Rep. 415; Pollock v. City of Louisville, 13 Bush 221, 26 Am. Rep. 260; Jolly v. Hawesville, 89 Ky. 279, 12 S. W. 313; Greenwood v. City of Louisville, 13 Bush 226, 26 Am. Rep. 263.

It is easy enough to formulate general principles like the one announced, and to declare in a general way that in one state of case there is liability, and in the other exemption; but it is often difficult to determine upon which side of the line an agreed state of acts will fall. This is because the line between powers exercised by the municipalities in their public capacity and for purposes pertaining to the preservation of the public health, safety, and morals, and those exercised for the convenience, advantage, and benefit of the city and its inhabitants, is often so narrow that the distinction between them cannot well be defined or supported by good reason. Numerous illus-

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trations showing the narrow differences that courts have made in respect to the liability and nonliability of municipal corporations for the acts of their agents may be found in 20 American & English Encyclopædia of Law, pp. 1191-1210, where many cases are cited, containing these nice distinctions. But without extending this opinion in drawing from the cases decided by other courts or attempting to harmonize them, we think it may be considered as settled in this jurisdiction that, in the absence of a statute, an action will not lie against a municipality for the neglect of a public duty imposed upon it for the benefit of the public or for the personal negligence or tort of any of its officers or agents in the performance of such public duties. Applying this principle to the facts of the case before us, appellant cannot be held responsible for the tortuous or negligent acts of its employes. When the act complained of was committed they were performing duties imposed upon the board of park commissioners by law for the benefit of the public; and from the performance of which no private or corporate gain, profit, or advantage was derived.

With the possible exceptions of McGraw v. Marion, 98 Ky. 673, 17 Ky. Law Rep. 1254, 34 S. W. 18, 47 L. R. A. 593, in which it was held that the town was answerable in damages for the unlawful act of one of its police officers in arresting a person for a violation of a void ordinance, we have found no case holding a municipal corporation responsible for the acts of an officer in the performance of a public duty. On the contrary, the correct doctrine, as stated in Jolly v. City of Hawesville, 89 Ky. 279, 11 Ky. Law Rep. 477, 12 S. W. 313, is: "The officers of a city are quasi civil officers of the government, although appointed

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by the corporation. They are personally liable for malfeasance or nonfeasance in office, but for neither is the corporation responsible. Omissions of duty imposed upon them by law productive of prejudice to an individual is not a corporate injury. The duty of officers of a city are prescribed by statute from which they derive their power. The corporation appoints them to office, but does not in that act sanction their official delinquencies or render itself liable for their official misconduct." And so in Taylor v. City of Owensboro, 98 Ky. 271, 17 Ky. Law Rep. 856, 32 S. W. 948, 56 Am. St. Rep. 361, it was said: "A municipal corporation is not liable for the acts of its officers in enforcing the criminal or penal laws of the Commonwealth, or in enforcing the penal ordinances of the city." To the same effect is Bean v. City of Middlesboro, 57 S. W. 478, 22 Ky. Law Rep. 415. From a consideration of the cases mentioned, and those that follow, it will be observed that the court makes a distinction between personal or individual torts of negligence on the part of the agents or servants of these corporations committed when in the discharge of some public duty and injuries done to property rights, although likewise in the performance of public duties. Thus, in City of Paducah v. Allen, 111 Ky. 361, 23 Ky. Law Rep. 701, 63 S. W. 981, 98 Am. St. Rep. 422, Clayton v. City of Henderson, 103 Ky. 228, 20 Ky. Law Rep. 87, 44 S. W. 667, 44 L. R. A. 474, and others of a like character, the right to maintain an action against the city was rested upon the ground that the wrongs committed were in the nature of a nuisance and amounted to a taking of property within the meaning of section 242 of the Constitution. And so in Bank of Hopkinsville v. Western Kentucky Asylum, 108 Ky. 357, 21 Ky. Law

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Rep. 1820, 56 S. W. 525, Hauns v. Kentucky Central Asylum, 103 Ky. 562, 20 Ky. Law Rep. 246, 45 S. W. 890, and Herr v. Central Lunatic Asylum, 97 Ky. 458, 17 Ky. Law Rep. 320, 30 S. W. 971, 28 L. R. A. 394, 53 Am. St. Rep. 414, the complaining parties, in order to protect their property rights, were granted the adequate relief. Another distinction is made when it comes to matters relating to contracts, as in Gross v. Kentucky Board of World's Fair Managers. 105 Ky. 840, 20 Ky. Law Rep. 1418, 49 S. W. 458, 43 L. R. A. 703, where an action for breach of contract was sustained upon the ground that all corporations vested with the right to sue and be sued, and contract and be contracted with, may bring and defend actions relating to contracts. The right to make contracts is essential to their existence, and as a necessary incident thereto they may sue and be sued concerning the contracts they have authority to make.

It has also been settled by numerous decisions that municipal corporations are liable for damages sustained by reason of defects or obstructions in the streets or highways, and for injury done to property by the negligence or improper construction of streets or highways. But, we will not further extend this opinion in the enumeration of instances pointing out when municipal or public corporations may be sued for torts or negligence, and when an action will not lie. From the cases written by this court. it may safely be said that in matters pertaining to the conduct of the charitable, reformatory, penal, and other public institutions, such as parks, supported by taxation, an action will not lie against the municipal or other corporation or body that manages and controls them, for the tort or neglgence of the agents or servants in their employment. Nor will a municipal cor-

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poration be responsible for the misdoing of persons in charge of the police or fire departments of the city.

Wherefore the judgment is reversed, with directions to dismiss the petition.

CASE 48.—PROSECUTION AGAINST LUCY PATRICK FOR EXHIBITING AND CIRCULATING A THREATENING LETTER.—December 6.

Commonwealth v. Patrick

Appeal from Magoffin Circuit Court.

D. W. GARDNER, Circuit Judge.

From an order overruling a demurrer to the indictment the Commonwealth appeals. Indictment held not to state an offense—Opinion certified.

1. Threats—Statutes—Construction.—Ky. Stats., 1903 section 1222, provides that if any person shall knowingly send any letter, with or without a name signed thereto, or with a fictitious name, threatening to kill another, or to do him or his wife or child harm, or burn or destroy his house or other property, or to accuse him or his wife or child of a felony, with the intention to extort or gain money, goods, wares, merchandise, or a deed, will, or other instrument of writing, from the person so threatened, or from any other, he shall be confined, etc. Held, That the sending of a threatening letter by one woman to another for the purpose of blackmail was not an offense under such section; it being an essential ingredient of the crime thereunder that there be threats to do harm to a person, or to destroy his property, or charge him or his wife or child with a felony, as well as to extort money, etc.
2. Same—Act March 17, 1902 (Laws 1902, p. 55, ch. 25), which was an enlargement of Kuklux Act April 11, 1873 (Pub. Laws

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1873, p. 35, ch. 767), which was entitled "An act to prevent lynching and injury to and destruction of real property" by "riotous assemblages, * * * and to prevent the posting and circulation of threatening letters," etc. The first section prohibits persons banding together to injure or disturb another, the second is against banding together to injure or destroy property, and the ninth, which is Ky. Stats., 1903, section 1241a, subsection 6, provides that if any person shall send, circulate, or exhibit any threatening notice or letter, signed with such person's name, or anonymously, he shall, on conviction, be fined, etc. Held, That, as the purpose of such act was to prevent kukluxing, a prosecution for sending or circulating a threatening letter thereunder could not be sustained, unless there was, in addition, a banding of persons to intimidate, alarm, disturb, or injure another, etc., so that the sending of an intimidating letter by one woman to another to blackmail was not an offense thereunder.

3. Same—Indictment.—An indictment for sending a threatening letter in alleged violation of Ky. Stats., 1903, section 1241a, subsection 6, providing that if any person shall send, circulate, etc., a threatening letter, signed by himself or another's name or anonymously, he shall be punished(etc., in the language of the statute, was fatally defective for failing to set out the letter in substance.

4. Same—Nature of Offense.—Defendant wrote a letter to her suspected rival in her husband's affections, charging the addressee with having received money and property from the husband, and demanding that it be returned, or the addressee's conduct would be exposed. Held, That the sending of such letter was not an indictable offense.

N. B. HAYS, Attorney General, C. H. MORRIS and A. F. BYRD for Commonwealth.

J. J. C. BACH for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

Appellee was indicted by the grand jury of Magoffin county, charged with exhibiting and circulating a threatening letter. The indictment runs in this language: "The grand jury of Magoffin county in the

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name and by the authority of the Commonwealth of Kentucky accuse Lucy Patrick of the offense of circulating and exhibiting a threatening letter, committed in the manner and form as follows, to-wit: The said defendant on the 4th day of February, 1907, in the county and circuit aforesaid, did unlawfully send, exhibit, and circulate a threatening letter addressed to Maud Dixon for the purpose of intimidating and extorting money and property from the said Dixon, against the peace and dignity of the Commonwealth." A demurrer to the indictment was sustained. That action presents the first question for consideration.

It is not made clear to us under what statute the indictment was intended to be framed. There are two statutes in force in this State, to which the act charged might have been referable, had facts been sufficiently stated. One is section 1222, Ky. Stats., 1903, which reads: "If any person shall knowingly send any letter, with or without a name signed thereto, or with a fictitious name, threatening to kill another, or to do him or his wife and child harm, or to burn or to destroy his house or other property, or to accuse him or his wife or child of a felony, with the intention to extort or gain money, goods, wares or merchandise, or a deed, will or other instruments of writing from the person so threatened, or from any other, he shall be confined in the penitentiary not less than one nor more than five years." The other is subsection 6, section 1241a, Ky. Stats., 1903, which subsection is in these words: "If any person shall send, circulate, exhibit or put up any threatening notice or letter, signed with such person's own or another's name 'or anonymously' he shall, upon conviction thereof, be fined not less than one hundred dollars,

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nor more than five hundred dollars, and imprisoned in the county jail not less than three nor more than twelve months." The circuit court and the prosecution treated the latter section as applying.

That the former did not apply to the state of facts developed, nor to those averred in the indictment, is certain. By that section it is an essential ingredient of the crime denounced by it that there must be in the letter a threat to do harm to a person, or to destroy his property, or to charge him or his wife or child with a felony, as well as that the person indicted shall have had the purpose to extort money or property, or the execution of a deed, or will, or other writing from the person threatened. But under the latter section such ingredients do not expressly appear to be necessary in order that the statutory offense may be committed. Appellee argues that the two sections should be read together as being parts of the same statute, and as grades or degrees of the same criminal act. But upon a study of the statutes, and of their history, we find they are not at all related. The former statute is brought over into the present revision from the General Statutes, and was formerly section 3 of article 6 of chapter 29 of that compilation. Subsection 6 of section 1241a is part of the act of March 17, 1902, (Laws 1902, p. 59, c. 25, section 6), which was in turn an amendment to the act of 1897 (Laws 1897, p. 32, c. 20, section 9), the latter brought about by the era of tollgate raiding, and was an enlargement upon the old Kuklux act of April 11, 1873, (Pub. Acts 1873, p. 35, c. 767). Buchannon v. Commonwealth, 95 Ky. 334, 15 Ky. Law Rep. 738, 25 S. W. 265; chapter 29, art. 36, subdiv. 7, section 1, Gen. Stats.

The act of March 17, 1902, was enacted under this title: "An act to amend and re-enact an act entitled

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'An act to prevent lynching and injury to and destruction of real property in this Commonwealth at the hands of mobs, or other riotous assemblages of persons, and to prevent the posting and circulation of threatening letters, and to prescribe penalties for the enforcement of its provisions,' same being chapter twenty of the acts of eighteen hundred and ninety-seven, and which was approved by the Governor May 20th, 1897." This act came up for construction in Weber v. Commonwealth, 72 S. W. 30, 24 Ky. Law Rep. 1726. The objection urged against the act at that time was that it violated section 51 of the Constitution, which requires each legislative act to relate to but one subject, and that subject to be expressed in the title. Responding to the attack upon the act upon that ground, this court said: "The act is in 11 sections, and all its provisions are germane to the subject expressed in the title. The general subject of the act is the better preservation of the public peace and the suppression of mobs and other unlawful confederations. The whole of the act relates to this subject. While the title of the act might have been more concisely expressed, it seems to us to state the subject of legislation with sufficient clearness to indicate to a person of ordinary intelligence what was meant. It is true the first section of the act provides against persons banding themselves together for the purpsoe of injuring or disturbing another; the second, against those banding themselves together for the purpose of injuring or destroying property; the ninth, against those who sent our or put up a threatening notice or letter. But all these things have a natural connection, and fall under the general subject which the Legislature had in mind. * * * The sending of threatening letters has a natural con-

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nection with the subject of the act, because such letters and notices are means commonly employed to terrify and annoy citizens by the lawless persons aimed at in the other sections of the act."

It is true that in that case there was not involved a prosecution under section 9 of the act, which is subsection 6 above quoted. But the prosecution was under the first section against persons banding together to terrorize others. If the act was bad, in that it was in violation of section 51 of the Constitution, it was permissible to show it by a course of reasoning to establish its multifariousness both in title and context; for, if the constitutional provision was violated with respect to the title embracing more than one subject, the act fell, and no prosecution could be maintained under it, and, if the act was bad at all, the vice was present both in its title and in its body. The court sustained the act upon the ground that it embraced but one subject. It is permissible that various features of the single subject may be legislated upon in an act, so long as they are cognate and logically pertain to the subject. The act was not dual in subject. Its end was to prevent what was formerly known as "Kukluxing." Various features of that subject were treated of in the act. One of them was the familiar practice of posting or sending threatening letters by members of the confederacy. To sustain a prosecution for sending or circulating such letters, they must pertain to one of the other acts which are denounced by the statute, viz., the banding together of persons for the purpose of intimidating, alarming, disturbing, or injuring any person, or to rescue a prisoner charged with a public offense, or to prevent the lawful prosecution of such prisoner, or an unlawful confederation for the purpose of in-

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juring property of another; and unless the threatening letter has reference to or bears upon such unlawful banding or confederation for one of the purposes denounced by the statute, it does not fall under subsection 6 of section 1241a, supra. The averment of the indictment failing to disclose such connection of the letter, the indictment was not good.

The indictment is, furthermore, insufficient in form. While generally a statutory offense may be stated in the exact language of the statute, it is not always so. The indictment must be sufficiently explicit, so as to put the accused upon his defense as to the particular act which he is called upon to defend. The letter, or its substance, should have been set out in the indictment, so that the defendant might have prepared herself to meet the exact accusation at her trial. The letter produced at the trial is an emanation from a jealous woman to her suspected rival in her husband's affections. It charged the person addressed with having received money and property from the hands of the husband of the accuser, and demanded that they be returned, or she should be exposed. The threat is in this language: "You had better be sure and send everything. If you don't, there is going to be a racket, and a big one too. I guess you would hate for me to tell Dr. and your mother the way you did while you staid in the store and about those letters"—and "I mean to tell everybody about you, everything I know." Sending such a letter, though without truth to support it, and offensive as it may be to good taste, or even decency, is not an indictable offense under the laws of this State.

This opinion is ordered to be certified to the circuit court.

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CASE 49.—PROSECUTION AGAINST JAMES E. LEMORE FOR VIOLATING LOCAL OPTION LAW.—December 11.

Lemore v. Commonwealth

Appeal from Fulton Circuit Court.

R. J. BUGG, Circuit Judge.

Defendant convicted and appeals—Affirmed.

1. Intoxicating Liquors—Unlawful Sales—Evasion of Local Option Law—Evidence—Place of Offense.—Under Ky. Stats., 1903, section 2570, providing that no trick or pretense shall be allowed to evade the operation of any local option law, evidence that a gasoline boat on the Mississippi river landed in Kentucky and took on the defendant, and went to the Missouri side of the river where defendant bought liquor, and was then landed off the Kentucky side, no fare being charged, showed an evasion of the law within the section justifying a conviction.
2. Criminal Law—Jurisdiction—Locality of Offense.—Where accused, in Kentucky, went on a boat, and crossed over to the Missouri side of the river, and there bought whisky in violation of the laws of Kentucky, the courts of Kentucky have jurisdiction of the offense, since the States of Kentucky and Missouri, under Act Cong. March 6, 1820, ch. 22, 3 Stat. 545, have concurrent jurisdiction over the Mississippi river.

ROBBINS, THOMAS & TYLER and F. S. MOORE for appellant.

N. B. HAYS, Attorney General, C. H. MORRIS, W. H. HESTER and T. N. SMITH for appellee.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

James E. Lemore was indicted for violating the local option law in Fulton county. The proof on the

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trial showed that Lemore is the owner of a gasoline boat running on the Mississippi river between Hickman, Ky., and New Madrid, Mo. As the boat was going down the river on one of its trips, it stopped at Mabel, in Fulton county, to put off some freight for William Sutberry. Sutberry got on the boat, and after it had pulled out and was near the Missouri side of the river he bought from Lemore a quart of whisky. The boat then came back to Skaggs landing, which was on the Kentucky side and about a half mile below Mabel. Sutberry got off there. He did not pay any fare on the boat. He got on it for the purpose of buying the whisky. After he got in the river he told Lemore that he would like to have a quart of whisky. Lemore told him that he was coming back on that side after a while; that he had to make another landing down there. The proof is not clear or positive that the boat did land on the Missouri side after it left Mabel and before it landed at Skaggs; but the proof is positive that the whisky was sold when the boat was on the Missouri side of the thread of the stream. Sutberry was not asked to pay any fare. The boat carried freight and passengers. It was 12 feet by 50. Lemore had a United States government license to sell whisky on the boat. Lemore testified among other things, as follows: "A. I don't think I ever sold any in Kentucky, unless Kentucky extends to the other side of the river. I always cross over the river from Kentucky when I have occasion to sell whisky. Q. Can you land at any place on the river? A. At any place where a skiff can go. Q. And if a person hails you anywhere, you go and get him or take his freight on? A. Yes, sir; I would land wherever I was hailed. I never ask a man what he wants until I am out in the river. Q. Where would

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you go as a usual thing, just pick a man up? A. I would go to the bank and get him. Q. On the Kentucky side, then where would you go? A. I would back out from the bank and start ahead, and then ask him where he was going, or what he wants, and if he is going to a particular landing I take him there. Q. If he is not going to any particular landing, then what? A. If he tells me that he wants a bottle of beer or whisky, I take him to the Missouri side and sell it to him. Q. Where you take a passenger from the Kentucky shore and go to the Missouri side and sell him liquor and bring him back to the Kentucky shore, do you ever charge these passengers for passage? (Objections by the defendant. Overruled by the court. Exceptions by the defendant.) A. Sometimes. Q. What is the general practice? A. Well, they get on the boat and say they want a quart of whisky, or something like that. I take them out and sell it to them and bring them back to the shore again and don't charge any fare." On this evidence the court gave the jury this instruction: "The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that, while defendant's boat was tied on the Kentucky shore, the witness Sutberry got on the boat for the purpose of purchasing whisky, and that the defendant knew that such was the witness' purpose, and that they then proceeded to cross the river, where the whisky and money were exchanged, and you believe beyond a reasonable doubt that the purchase and sale of said whisky was in the knowledge and purpose of both buyer and seller before they left the Kentucky shore, then the sale took place in Fulton county, Ky., and such action was in law a device to evade the operation of the law against the sale of liquors, without a license to do so."

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Sec. 2570, Ky. Stats., 1903, is in these words: "No trick, device, subterfuge or pretense shall be allowed to evade the operation or defeat the policy of the law against selling spirituous, vinous or malt liquors without license or in violation or evasion of any local option laws prevailing in any county, town, city, precinct or municipality of this Commonwealth." In Adair v. Commonwealth, 80 S. W. 1132, 28 Ky. Law Rep. 659, and Merritt v. Commonwealth, 92 S. W. 611, 29 Ky. Law Rep. 184, we had before us facts not unlike those in this case, and we there sustained a conviction. It is manifest from the proof that Sutberry got on the boat for the purpose of buying the whisky, and that he waited until the boat got over on the Missouri side of the stream for the purpose of evading the Kentucky laws. It may also be inferred that Lemore, in carrying Sutberry from Mabel and bringing him back to Skaggs landing, which was as near his home as Mabel, was actuated by the motive of selling him the whisky. The rule with us is that if there is any evidence the question is for the jury.

In view of the conduct and circumstances of the parties, there was sufficient evidence to go to the jury. While the evidence is not precisely the same, when taken as a whole, it as well shows an evasion of the statute as the proof in either of the two cases cited. Lemore is engaged in interstate commerce. The State of Kentucky may not interfere with interstate commerce; but when he takes a man from Kentucky out in the river to sell him whisky, and then brings him back to Kentucky, he is not engaged in interstate commerce. but simply selling whisky in evasion of the laws of Kentucky. Foppiano v. Speed, 199 U. S. 501, 26 Sup. Ct. 138, 50 L. Ed. 288. If he had sold the whisky while his boat was lying at the

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bank at Mabel, unquestionably he would be liable, as the thread of the stream is the State line; but when he took the proposed purchaser out beyond the thread of the stream to sell him whisky, and then brought him back to the Kentucky shore, the whole transaction will be looked at, and the sale will be regarded as made not at the point at which the whisky was delivered and the money paid, but on the Kentucky shore, where it was begun, and where it was consummated. In Adair v. Commonwealth, supra, we said: "When an act is made up of a series of events, and is criminal in its result, all the occurrences leading up to the consequence need not be done within the jurisdiction where it is sought to be punished. It is enough if the result in that jurisdiction constitutes an offense. To dispose of liquor by a sale in a local option district in this State under our statutes is an offense, if done by another than a manufacturer. If, to accomplish the criminal acts, the vendor executes parts of it outside of the prohibition district, yet all so connected with some part of the transaction in the district that the result is the same as if all had occurred there, the act is as much a crime against the law as if it had all occurred there. It is not the payment for liquor that is aimed to be prohibited, nor is contracting for liquor the mischief aimed at. It is the furnishing it within the excluded territory that is the particular vice intended to be suppressed."

In addition to this, while by the act of Congress the middle of the main channel of the Mississippi river is the boundary between Kentucky and Missouri, both states are given concurrent jurisdiction over it. Act Cong. March 6, 1820, c. 22, 3 Stat. 545. The center of the Mississippi is also the line

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between Illinois and Iowa, and both states are given concurrent jurisdiction over it. In State v. Mullen, 35 Iowa, 199, the defendant had been convicted in Iowa of keeping a house of ill fame on a boat which was anchored east of the middle line of the stream, and contended that the courts of Iowa had no jurisdiction. The court held otherwise, saying: "There is an immense commerce on this great common highway. Water crafts, rafts, and boats, of almost every kind and description, are each day floating upon its waters. Thousands of persons are engaged in this commerce. Contracts are made and obligations assumed for which those boats and crafts may, under certain proceedings, be made liable. Injuries are inflicted upon persons and property by persons while on the river for which they should be held answerable, criminally as well as civilly. If jurisdiction in all such cases was made to depend on the inquiry whether the boat or vessel was on one side or the other of the main channel, whether the injury was inflicted or crime committed east, or west, or north, or south, of such line, it can be readily seen that it would be frequently almost impossible to determine such jurisdiction, and that a mistake in this respect would prove fatal to the action or prosecution, and hence the reason of making the jurisdiction concurrent in all such cases. Such property and persons are as a rule transitory, moving here today and gone tomorrow." In State v. Metcalf, 65 Mo. App. 681, the defendant was indicted in Missouri for keeping a gaming house, and it appeared that the boat was on the Kansas side of the thread of the stream. The conviction was sustained. The River St. Croix is the dividing line between Wisconsin and Minnesota, and the same rule was applied

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in Minnesota to an offense committed on the Wisconsin side of the line, and in Wisconsin to an offense committed on the Minnesota side of the stream. State v. George, 60 Minn. 505, 63 N. W. 100; State v. Cameron, 2 Pin. (Wis.) 495. See, also, Welsh v. State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; Dungan v. State, 125 Ind. 130, 25 N. E. 171, 9 L. R. A. 321; State v. Plants, 25 W. Va. 119, 52 Am. Rep. 211; Sanders v. Anchor Line, 97 Mo. 26, 10 S. W. 595, 3 L. R. A. 390; Wedding v. Meyler, 192 U. S. 573, 24 Sup. Ct. 322, 48 L. Ed. 570, 66 L. R. A. 883.

Judgment affirmed.

CASE 50.—PENAL ACTION BY THE COMMONWEALTH AGAINST D. W. HILTON AND OTHERS.—December 11.

Hilton v. Commonwealth

Appeal from Henderson Circuit Court.

J. W. HENSON, Circuit Judge.

From the judgment defendant Hilton appeals—Affirmed.

1. Appeal—Cross-Appeal—Entry on Record.—Criminal Code Prac., section 355, provides that in penal actions the appeal shall be similar in all respects to appeals in civil actions. Civil Code Prac., section 755, declares that an appellee may obtain a cross-appeal, at any time before trial; by an entry on the records of the court of appeals. Held, That, as a cross-appeal can not be granted by the circuit court, questions raised by the Commonwealth, in what purports to be a cross-appeal in a penal action, will not be considered by the

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court of appeals, where no entry thereof has been made in that court.

2. Insurance—Unjust Discrimination—Rebates on Premiums—Penalties—Actions for—Questions for Jury.—In an action to recover the penalty imposed by section 656, Ky. Stats., 1903, for rebating upon a policy of insurance, defendant's guilt held, under the evidence, a question for the jury.

3. Same—Parties Liable.—Under Ky. Stats., 1903, section 656, providing that every insurance company, officer, or agent thereof who shall grant a rebate on a policy of insurance not specified in the policy contract shall be fined, an agent of the company who knowingly participates in the act of the insurance broker who secured the contract in granting such a rebate is guilty of the act prohibited, and liable for the penalty imposed.

4. Same—Excessive Recovery.—In an action by the Commonwealth to recover the penalty imposed by Ky. Stats., 1903, section 656, providing a penalty of $500 for rebating upon a policy of insurance, a verdict of $350 was not excessive, or so large as to indicate passion or prejudice.

5. Same—Judgment—Enforcement—Capias Pro Fine.—Under Criminal Code Prac., section 11, providing that a public offense of which the only punishment is a fine may be prosecuted by a penal action in the name of the Commonwealth, and that proceedings therein are regulated by the Code of Practice in civil cases, a fine imposed by Ky. Stats., 1903, section 656, for rebating on a policy of insurance, may be recovered by the Commonwealth in a civil action, and hence, upon recovery of the fine, the Commonwealth is entitled to a capias pro fine under Criminal Code Prac., section 301, providing that, upon judgment for fines, whether rendered on indictments, penal actions, or otherwise, writs of execution may be issued against the person or property of the defendant.

6. Same—Statutes Imposing Penalties—Construction.—Ky. Stats., 1903, section 656, provides that no insurance company or agent thereof shall make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon, nor pay or allow any rebate of premium payable on the policy, or advantage in the dividends, or other benefit to accrue thereon, not specified in the policy contract of insurance. Held, That the object of the statute is to prevent insurance companies from discriminating in favor of individuals between insurants of the same class,

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either as to premiums charged or dividends allowed, and should be given a reasonable interpretation and strict, though not oppressive, enforcement.

DORSEY & STANLEY for appellant.

We think we are entitled to a reversal of this case for these reasons, to-wit:

1. The court should have granted a peremptory instruction at the conclusion of plaintiff's evidence, because the plaintiff had not made out a case against the defendant, D. W. Hilton.

2. After all the evidence was in we were entitled to a peremptory instruction.

3. We were entitled to a peremptory instruction because the court erred in giving instruction No. 1 to the jury.

4. We are entitled to a reversal of this case because the verdict of $350 is excessive, and is not sustained by the evidence.

S. V. DIXON and N. P. TAYLOR for Commonwealth.

N. B. HAYS, Attorney General, and C. H. MORRIS of counsel.

POINTS AND CITATIONS.

1. Cross-appeal against the Michigan Mutual Life Insurance Company, because of peremptory instruction of the court, for insufficient evidence on the part of the Commonwealth. (Equitable Life Assurance Society of U. S. v. Comth., 28 Ky. Law Rep., 333; United States Insurance Co. v. The Comth., 28 Ky. Law Rep., 948; Ky. Stats., section 656.)

2. Excessive verdict of jury founded upon prejudice and passion.

3. That the verdict of the jury was against the law and the evidence.

4. Can a capias pro fine issue on a judgment in a penal action? (Harp v. Comth., 22 Ky. Law Rep., 1792; Criminal Code Proc., section 301.)

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellee, Commonwealth of Kentucky, by a penal action instituted in the Henderson circuit court

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under section 656, Ky. St. 1903, sought to recover of the Michigan Mutual Life Insurance Company, D. W. Hilton, its agent for the State of Kentucky, and W. B. Ware, a broker or soliciting agent of the latter, a fine of $500, for their alleged wrongful act in rebating a premium due upon a policy of insurance of $10,000, issued by the insurance company in question to Charles T. W. Argue, of the city of Henderson, April 10, 1906, insuring his life to that amount. The action was later dismissed as to Ware on appellee's motion. Answers were filed by the insurance company and the appellant, Hilton, traversing the averments of the petition, and the action proceeded to a trial as to them; but, after the introduction of appellee's testimony, the lower court, at the instance of the insurance company, peremptorily instructed the jury to find for it, which was done, and to this ruling of the court appellee at the time excepted. At that juncture a like instruction was asked by the appellant, Hilton, which the court refused to give, and to this ruling appellant entered an exception. Upon the conclusion of all the evidence, appellant renewed the motion for a peremptory instruction, but the motion was again overruled, to which appellant excepted. The case then went to the jury, and by the verdict returned appellant was found guilty of the offense charged, and his punishment fixed at a fine of $350, upon which judgment was duly entered. Thereupon he filed motion and grounds for a new trial, but this motion was also overruled, and of this action of the court and the judgment of conviction appellant complains. Hence this appeal.

Appellee also prayed and was granted an appeal by the lower court from the judgment entered upon the verdict of the jury in favor of the Michigan

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Mutual Life Insurance Company, and briefs of counsel speak of the cross-appeal of appellee, but the record does not show that appellee is prosecuting an appeal, or that a cross-appeal has been granted it. Section 355, Cr. Code Prac., provides: "If the prosecution be by a penal action, the appeal shall be similar in all respects to appeals, in civil actions." Section 755, Civ. Code Prac., provides: "The appellee may obtain a cross-appeal, at any time before trial, by an entry on the records of the Court of Appeals." No such entry has been made in this court and a cross-appeal cannot be granted by the circuit court. It must be granted by the Court of Appeals. Murphy v. Blandford, 11 S. W. 715, 11 Ky. Law Rep. 125; Mudd v. Mullican, 12 S. W. 263, 385, 11 Ky. Law Rep. 417. Besides, in an ordinary action, if the appellee desires to avail himself on cross-appeal of errors committed by the trial court, he must file motion and grounds for a new trial in the lower court as required in order to prosecute a direct or original appeal (L. & N. R. R. Co. v. Whitehead's Adm'r, 73 S. W. 1128, 24 Ky. Law Rep. 2315); and this appellee did not do. It is patent, therefore, that the action of the lower court, in peremptorily instructing the jury to find the Michigan Mutual Life Insurance Company not guilty and in entering judgment dismissing the action as to it, in accordance with the verdict of the jury, is not before this court for review either by original or cross-appeal; consequently that matter will not be considered.

It is only proper, therefore, to consider the alleged errors relied on by appellant, Hilton, for a reversal of the judgment as to him. He complains (1) that the trial court erred in refusing him the peremptory instruction; (2) that the verdict was contrary to and

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without support from the evidence; (3) that the jury were erroneously instructed; (4) that it was error to award a capias pro fine against him. Section 656, Ky. St. 1903, under which the action was instituted, provides: "No life insurance company doing business in Kentucky shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged for the policies of life or endowment insurance, or in the dividends or other benefit payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon; or any valuable consideration or inducement whatever not specified in the policy contract of insurance. Every company, or officer or agent thereof, who shall violate the provisions of this section, shall be fined in any sum not exceeding five hundred dollars, to be recovered by action, in the name of the Commonwealth, and on collection, paid into the State treasury." It appears from the testimony in the case at bar that Argue's application for the insurance policy, later issued by the Michigan Mutual Life Insurance Company, was received by Ware, who was at the time an insurance broker engaged in the business of soliciting applications for the company by employment from appel-

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lant, Hilton, and that he was paid for his services a commission of 80 per cent. out of the first premium received on each policy issued by the company upon an application procured by him. The terms of the contract of insurance were agreed upon between Argue and Ware, and the contract consummated by a subsequent delivery of the policy by the company and the payment by Argue of the amount Ware had agreed to accept in full of the first premium. This was $49.14, and only 30 per cent. of the actual annual premium of $163.80 expressed in the policy. The policy was delivered to Argue by the appellant, Hilton, state agent of the Michigan Mutual Life Insurance Company, and Argue then paid him the $49.14, in a check on the Ohio Valley Banking & Trust Company. This amount appellant accepted without objection, and at the same time executed to Argue a receipt acknowledging the payment in full of the entire annual premium of $163.80 named in the policy. Appellant admitted these facts on the trial, but explained that his acceptance of the check, without inquiry as to the remainder of the premium, was based upon Argue's statement that $49.14 was what he owed Ware on the policy; thereby leaving it to be inferred that he supposed the difference between the amount actually paid and the full premium, viz., $114.66, had previously been settled with, or paid to Ware by Argue. Argue also admitted that he told appellant when he received the policy and paid him the check of $49.14 that the sum it expressed was what he was owing on the policy, but that the statement was made in reply to an inquiry from appellant as to how much he owed on the policy. The following questions and answers found in the testimony of Argue will show, however, that this was not all

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that occurred when appellant delivered the policy: "Q. What did you say to Mr. Hilton when he came and delivered the policy? Did you tell him of the agreement you had with Mr. Ware? Ans. Mr. Hilton asked me what Mr. Ware had agreed to deliver me the policy for. Q. What did you tell him? Ans. I told him it was 70 per cent. reduction." It is true that the conversation as here related by Argue was denied by appellant, but such denial made an issue of fact between the two witnesses which it was the province of the jury to settle, moreover, in view of the information brought home to appellant by the difference between the amount of premium which the policy delivered by him showed to be due and the sum paid, was of itself evidence sufficient to indicate to him that there had been, as testified by Argue, an agreement between Ware and Argue that the latter should be allowed a rebate in premium of .70 per cent. It is manifest, therefore, that there was evidence conducing to prove appellant guilty of the offense charged, and that it authorized the submission of the case to the jury. This being true, the refusal of the lower court to grant the peremptory instruction asked by appellant was not error; nor, is there any just ground for appellant's contention that the verdict of the jury was not supported by the evidence. If, as found by the jury, appellant knowingly participated in the act of Ware, in granting Argue the rebate of 70 per cent., he as well as Ware, violated the statute, for its language is: "Every company, or officer or agent thereof, who shall violate the provisions of this section shall be fined," etc. Equitable Life Insurance Society of U. S. v. Commonwealth, 89 S. W. 537, 28 Ky. Law Rep. 333.

The instructions are not open to the criticism

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made by appellant's counsel. We doubt whether the law applicable to the case could have been more aptly set forth than was done by the instructions given the jury. The verdict was not, as claimed by counsel for appellant, excessive, or, as argued, so large as to indicate passion or prejudice on the part of the jury. If the jury had been actuated by prejudice or passion, they would hardly have stopped short of the maximum fine of $500.

Appellant's final contention, that the lower court erred in awarding a capias pro fine against him for the fine inflicted, is wholly untenable. Section 11 of the Criminal Code of Practice provides: "A public offense of which the only punishment is a fine, may be prosecuted by a penal action in the name of the Commonwealth of Kentucky. * * * The proceedings in penal actions are regulated by the Code of Practice in Civil Cases." This court has repeatedly held that under this statute a fine may be recovered in a civil action, unless the offense is one which is by statute required to be proceeded against by indictment alone. Commonwealth v. L. & N. R. R. Co., 80 Ky. 291, 3 Ky. Law Rep. 788, 44 Am. Rep. 475; Commonwealth v. Sherman, 85 Ky. 686, 9 Ky. Law Rep. 218, 4 S. W. 790; Commonwealth v. L. & N. R. R. Co., 37 S. W. 589, 18 Ky. Law Rep. 610. It was also held in Harp v. Commonwealth, 61 S. W. 467, 22 Ky. Law Rep. 1792, that in a penal action like this resulting in the recovery of a fine the Commonwealth is entitled to a capias pro fine; its right thereto being conferred by section 301 of the Criminal Code of Practice, which provides: "Upon judgments for fines, whether rendered on indictments, penal actions or otherwise, writs of execution, as provided in the General Statutes (now Kentucky Statutes), may be

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issued against the person or property, of the defendant." From our reading of the record and consideration of the errors assigned, we have been unable to find that appellant's substantial rights were prejudiced by any ruling of the trial court. The jury were instructed to acquit him unless they, from all the evidence, believed him guilty beyond a reasonable doubt. They found him guilty, and the record furnishes to us no legal reason for disturbing the verdict. The object of the statute is to prevent insurance companies from discriminating in favor of individuals between insurants of the same class, either as to premiums charged or dividends allowed. The offense of which appellant was convicted is more particularly embraced by that part of the statute which declares: "Nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy contract of insurance. * * *" It is important to the insured and to the insurance companies that the foregoing statute be given a reasonable interpretation and strict, though not oppressive, enforcement; otherwise the salutary effect designed by its enactment will be lost.

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CASE 50.—ACTION BY HAMP MIZE AGAINST THE LOUISVILLE & NASHVILLE R. R. CO. FOR DAMAGES FOR PERSONAL INJURIES.—December 12.

Mize v. Louisville & N. R. R. Co.

Appeal from Whitley Circuit Court.

M. J. Moss, Circuit Judge.

Judgment for defendant, plaintiff appeals—Affirmed.

1. Master and Servant—Master's Liability for Injuries to Servant—Acts Constituting Negligence.—A torpedo placed on a railroad track to warn a train of another ahead is not an obstruction, the placing of which on the track constitutes negligence, rendering the railroad liable for injuries to a section hand caused by its explosion.
2. Same—Contributory Negligence.—A section hand, who had been in the employ of a railroad for some time, and who was thoroughly familiar with torpedoes, knowing that they were in constant use by the railroad for the purpose of signaling trains that the track ahead was obstructed, and who knew that he had no opportunity of being apprised of the fact that a torpedo had been placed on the track, and that, if the train which had just passed should lose time, it would place a torpedo on the track to notify any train that might be following, was bound to see, in pushing a hand-car along the track, if a torpedo had been placed on the track, and, if he pushed the hand-car over one and was injured by its explosion, it was due to his own carelessness.
3. Same—Risks Assumed by Servant.—An employe assumes all of the risks ordinarily incident to the business in which he is engaged.

SHARP & SILER, Attorneys for appellant.

In this case the bold, stubborn fact shows that the torpedo was negligently left on the railroad tracks; that it was dangerous,

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and that appellant did not know it was on the track, and did not know of the danger by it being placed there, and for the reasons given we insist that the case be reversed. (Ill. Cent. R. R. Co. v. Leisarr's Admr., 28 Ky. Law Rep., 768; L. & N. R. R. Co. v. Foley, 94 Ky., 224.)

BENJAMIN D. WARFIELD for appellee.

POINTS DISCUSSED AND AUTHORITIES CITED.

The peremptory instruction was properly given for the reason:

1. That the petition did not state a cause of action against appellee, and

2. There was no evidence of actionable negligence against appellee which authorized the court to submit the case to the jury. The accident was one of the ordinary risks of the service. (Lindsay v. Hollenback & May Construction Co., 29 Ky. Law Rep., 68, and cases there cited and quoted from; Shemwell v. O. & M. R. Co., 117 Ky., 556; Wilson v. Chess W. Wymond Co., Ib. 567, and cases therein cited, particularly Mellott v. L. & N. R. Co., 101 Ky., 212; Sullivan v. L. & N. R. Co., 115 Ky., 447; L. & N. R. Co. v. Hart, by etc., 24 Ky. Law Rep., 1123; Merschell v. L. & N. R. Co., 29 Ky. Law Rep., 467; I. C. R. Co. v. Leisure's Admr., 28 Ky. Law Rep., 768, distinguished.)

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

Appellant was a section hand in the employ of the Louisville & Nashville Railroad Company, working under the direction of a section foreman. On the morning of March 28, 1905, this foreman, with appellant and a gang of men, left Jellico, Tennessee, on a hand car to go to a point north of Saxton to work. They rode in this way until they met a passenger train which was going south. In some way unexplained in the record, the hand car became disabled, and from this point, to the place where they were to work that day the hand car was pushed by the section hands, including appellant, who walked along

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the side of and behind the car pushing it ahead of them. While so pushing the car, a train was heard approaching, and the section foreman, who was some distance ahead of the men, signaled them to run the hand car to a point where it could be taken from the track, so as to permit the train to pass. Appellant and the other section men complied with the signal given by the foreman, and, while running the car ahead, as directed, ran it upon and over a torpedo which had been placed upon the track on the rail nearest appellant. The torpedo, when the hand car ran over it, was exploded, and a particle thereof passed into and injured the leg of appellant. To recover for this injury appellant filed his suit against the company, alleging that it negligently and carelessly caused, suffered, and permitted the torpedo to be placed and remain on the track of the railroad without the knowledge of appellant; that, by reason of said torpedo's being left on the track, it was dangerous and hazardous for the plaintiff to run the hand car along and upon the track. The defendant answered, denying that it negligently and carelessly caused, suffered, and permitted a torpedo to be placed and remain on the track of its railroad. It further pleaded contributory negligence on the part of appellant. A traverse of this plea completed the issue. Upon a trial of the case, at the conclusion of the introduction of plaintiff's testimony, the jury was instructed to return a verdict in favor of the defendant, which was done. To reverse this ruling and judgment of the lower court, the plaintiff appeals.

It is insisted for appellee that the allegations of the petition do not constitute a cause of action; that unless it is shown by the plaintiff that the torpedo was not placed upon the track for a necessary or

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lawful purpose, or that it was not properly placed upon the track, or that it was so placed that it could not, by the exercise of ordinary care, be discovered by appellant or that appellant did not know of the dangerous quality, character or nature of the torpedo, that he cannot recover. This contention is stoutly denied by appellant, and, relying upon the case of the Illinois Central Railroad Company v. Leisure's Adm'r, 90 S. W. 269, 28 Ky. Law Rep. 768, he insists that when he has alleged that the company had placed a torpedo upon its track, and he had no knowledge that it was there, and in the discharge of his duty, in operating the hand car and propelling it over said torpedo, he is injured, the company is liable therefor; that it was the duty of the company, when it had placed a torpedo upon the track, to notify those operating the hand car that it had been placed there, and that the failure of the company to give notice that it had been so placed was of itself an act of negligence on the part of the company. This issue brings squarely before us the question as to whether or not a torpedo is an obstruction.

It is a fact well known to those familiar with the operation of railroad trains that torpedoes are in general use as signals. Where a train has become disabled, or for any cause whatever is prevented from making schedule time, and is caught between telegraph stations off its schedule time, with the knowledge that another train is following, it becomes necessary that some signal should be given to the second train notifying it that the train in advance is blocking the way. Many devices and schemes have been resorted to in order to accomplish this result. Frequently a flagman is sent back to warn the approaching train, but in such cases the train in advance

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must wait until the approaching train has been notified of its presence upon the track a short distance ahead, or else it must proceed without the flagman. This method of notifying the on-coming train that the track was obstructed was early adopted. It necessarily impeded the progress of the train, and was tedious and tiresome to the traveling public. Later the use of the torpedo was discovered, and it was found that by placing one or more torpedoes upon the track, and fastening them to the rail by means of a small wire, that, when the on-coming train passed over and exploded them, those in charge of it knew that a train was just ahead of them, and they slackened the speed of their train and followed along cautiously in the wake of the train in advance. In this way no time is lost. Other devices have been restored to and found most acceptable, notably the electric block signal system, but none has been or doubtless can be invented which gives a more satisfactory result than the use of the torpedo, for the reason that flagmen have been known to fail in the discharge of their duties, electrical systems have frequently failed to operate, but the occasion is rare, indeed, where the torpedo has failed to explode, and notify those in charge of the train that the track is obstructed ahead. The torpedo, then, it will be seen, is a part of the machinery, a contrivance used to secure the safe operation of railroad trains. As such it serves a most useful purpose, and tends materially to lessen the chance of accident by collision, and, being such, it cannot be properly termed an obstruction, for an obstruction is something placed upon the track which is calculated to produce, rather than to prevent, an accident. It is true that to properly serve its purpose the torpedo must explode with con-

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siderable violence and force, in order to produce a sound loud enough to be heard by those engaged in the operation of the train above the sounds ordinarily produced by the train in its passage, and it is a well-known fact that all explosives are more or less dangerous and their use is accompanied with more or less hazard. The business of railroading is of itself a hazardous and dangerous business, and those who engage in it assume the risks ordinarily incident to the conduct of the business. It is not enough for plaintiff to allege that the company negligently placed the torpedo upon its track, or that it failed and neglected to notify him of its presence there, but he must further allege and show, before he would have the right to recover, that he could not, by the exercise of ordinary care, have discovered its presence there, for he was not upon the hand car, but was walking or running by the side of it, and, had he looked, he could not have helped but discover the presence of the torpedo upon the track ,because it was fastened to the rail nearest him. This case differs very materially from the Leisure Case, in this: that in that case the plaintiff was riding upon a hand car which was known by the company to be in a defective condition, and the injury in that case was no doubt directly traceable to the fact that the plaintiff was compelled to use or ride upon a hand car which was in a dangerous and faulty condition, and but for which unsafe condition of the car he would not have been injured. Particular stress was laid in that case upon the faulty condition of the car, rather than upon the presence of the torpedo upon the track, and the torpedo being upon the track was more properly an incident to the right of recovery than a cause therefor. The facts stated in the petition and its several

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amendments do not constitute a cause of action.

We come next to a consideration of the question as to whether or not the trial court erred in peremptorily instructing the jury. Upon this question, less of difficulty is presented, for the reason that the proof shows that appellant had been in the employ of the company some time; that he was thoroughly familiar with the character and nature of torpedoes; that he knew they exploded when run over or pressed by any heavy body; and that they were in constant use by the railroad company for the purpose of notifying trains that the track ahead was obstructed. On the morning in question appellant knew that a train had just gone south, and that, while they were following this train, he heard another train coming, and they were endeavoring to take the hand car to a place of safety before it arrived. He knew that he had had no opportunity of being apprised of the fact that a torpedo had been placed upon the track, and he also knew from his acquaintance with the operation of railroads that, if the train which had just passed should for any cause lose time or be compelled to stop, it would place a torpedo upon the track to notify any train that might be following it that it was obstructing the way, and, with this knowledge of the custom of those in charge of trains, he had a right to know that a torpedo might be placed upon the track, and in pushing the car along it was his duty to see if one was placed upon the track, and not blindly push the hand car over it and run the risk of being injured, and, if he does so, as the proof in this case shows, it is due to his own carelessness. In the Leizure Case the injured party was riding upon the car. The record shows that he fell off and was run over by the car. Therefore he must have

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had his back turned in the direction in which the car was going, whereas, in the case at bar, appellant was walking along in the same direction in which they were shoving the car, and by exercising the slightest care or attention, he must have discovered the torpedo upon the track, in which case, knowing the danger, they could have stopped the car, removed the torpedo, and replaced it upon the track after the car had passed. We have been unable to find any case similar to this, but, applying the principle that an employe assumes all of the risks ordinarily incident to the business in which he is engaged—a principle now too old and well established to need further elaboration here—it seems that this case falls clearly within the purview of this rule. In placing the torpedo upon the track the appellee company was guilty of no negligence, but, on the contrary, under such circumstances, its failure to place it there or by other signal warn the following train that the track was obstructed ahead would have been the grossest negligence on the part of the company. This torpedo was placed upon the track to warn the approaching train that the track was obstructed ahead. This aproaching train had not yet reached the place where the torpedo was, and therefore the purpose for which it had been placed there had not yet been served. Certainly there was no negligence on the part of the company in permitting it to be there; besides, it is primarily the duty of section hands, or crews, to look after the track and see that it is in proper condition, to see that no obstruction is placed upon the track, and, if any is there, to remove it. Had appellant, or his associates comprising this section crew, been attending strictly to their duties, they would have discovered the presence of the torpedo

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upon the track, and this is especially true if appellant's view is to be taken of it, that it was an obstruction. Viewed in this light, appellant was guilty of such contributory negligence that he should not be permitted to recover, but, considering this question in its proper light, as we see it, the placing of the torpedo upon the track for a useful and lawful purpose, which had not yet been served, was not an act of negligence on the part of appellee company, and consequently no cause of action existed against it for so doing.

Judgment affirmed.

CASE 52.—ACTION BY GEORGIA FITE AGAINST E. H. BRIEDENBACK AND OTHERS FOR VALUE OF PROPERTY ALLEGED TO HAVE BEEN WRONGFULLY SOLD.—December 12.

Fite v. Briedenback, &c.

Appeal from Daviess Circuit Court.

T. F. BIRKHEAD, Circuit Judge.

From the judgment plaintiff appeals, and defendant Briedenback prosecutes a cross-appeal—Affirmed on cross-appeal and reversed on appeal.

1. Appeal—Cross-Appeal—Amount Involved.—The cross-appeal, which Civil Code Prac., section 755, provides appellee may obtain at any time before trial by an entry on the records of the court of appeals, and which can only be taken in such court, and can not be granted by the trial court, may be prosecuted, though the amount in controversy as to appellee and the judgment from which he prosecutes it is less than the amount necessary to authorize an appeal.

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2. Husband and Wife—Liability for Rent—Property of Tenant's Wife.—Personal property of the wife of a tenant on the leased premises can not be subjected to payment of the rent; Ky. Stats., 1903, section 2127, providing that the wife shall hold all her estate free from the debts of her husband, section 2305 providing that rent may be recovered from the lessee, his assignee, or undertenant, and section 2307 providing that an attachment for rent shall bind and may be levied on any personal property of the original tenant in the county and the personal property of the assignee or undertenant found on the leased premises.
3. Sheriffs—Wrongful Levy and Sale—Liability to Claimant—The sheriff who levies an attachment and makes a sale thereunder is not protected from action by claimants of the property, though he takes a bond from the attaching creditor, containing a provision, unauthorized by Civil Code Prac., section 211, under which it is taken, obligating such creditor to pay to any claimant of the property the damage he may sustain from the seizure or sale.
4. Same—Actions—Parties.—One whose property is sold on attachment for debt of another may join in the same action therefor the sheriff who made the sale and the persons who procured him to make it.
5. Bailment—Liability of Bailee—Sale of Property on Attachment.—One in whose hands property is placed to safely care for for a consideration is not liable for its seizure and sale under attachment, he having had nothing to do therewith, except to surrender it to the sheriff on his demanding it by virtue of the attachment in his hands.
6. Attachment—Wrongful Sale—Liability of Plaintiff in Attachment.—Plaintiff in attachment is liable for the sale under the attachment of the property of another than the debtor only in case he procured or directed the officer to sell it.

C. M. FINN, Attorney for appellant Briedenback.

1. Appellant Briedenback prosecutes a cross-appeal because the lower ccurt refused to hold that the property of the wife, taken upon leased premises, became subject to the payment of the husband's debt to the landlord. That the lower court properly sustained a demurrer to so much of the answer of Briedenback as attempted to hold the wife's property subject to the payment of the husband's debts is settled by Ky. Stats., section 2127.

2. Knowing that this negro woman, Georgia Fite, has been wrongfully deprived of six or seven hundred dollars worth of

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property without any fault on her part and that the verdict of the jury only awarding her damages in the sum of $75 is a gross injustice, we ask this court to award her a new trial.

E. B. ANDERSON, Attorney for appellee.

POINTS AND AUTHORITIES.

The personal property of a tenant's wife set up and used on leased premises, under Kentucky Statutes, is in lien for the claim of the landlord for rent. (Bacon's Abridgments, Distress, section 349; Ky. Stats., sections 2305, 2307, 2317; Taylor's Landlord & Tenant, Ed. 1879, p. 15, section 19; Emig v. Cunningham, 62 Md., p. 458; Blanche v. Bradford, 38 Pa. St. 344, 80 Am. Dec. 489; Jones on Liens, vol. 1, 2d Ed., section 562, p. 347; Murphy v. Borland, 92 Pa. St., p. 90; Minor's Institutes, vol. 4, part 1, p. 105, Ed. 1883; Minor's Institutes, vol. 4, part 1, p. 113, Ed. 1883; Waller v. Morgan, 18 B. M., 136 and 144.)

OPINION OF THE COURT BY JUDGE CARROLL—Reversing on appeal and affirming on cross-appeal.

The appellant, as plaintiff below, brought this action against Briedenback, Burch, Short, and Dawson, alleging, in substance, that she was the owner of certain described articles of personal property of the value of $920, which she delivered to Dawson who agreed to safely care for them for a fixed compensation, but that Briedenback and Burch procured Short, who was sheriff of the county, to wrongfully take possession of the property and sell same. The husband of appellant was the tenant of Briedenback, and became indebted to him in the sum of $100 for rent. The husband had also executed a mortgage on the property to one Hartnetz, for whom Burch acted as agent. After appellant had placed the property in the warehouse of Dawson, Briedenback obtained a landlord's attachment, and had it placed in the hands of Short, who levied it upon the property. Hart-

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netz, through his agent, Burch, also sued out an attachment in the court in which the landlord's attachment was obtained, and it was levied by Short upon the property the landlord's attachment had been levied on. Afterwards an order was made by the judge of the quarterly court, directing the sheriff to sell the attached property to satisfy the landlord's rent, and the claim of Hartnetz amounting to some $26. Under this order, the sheriff proceeded to sell the property, but, before doing so, required Briedenback to execute to him a bond of indemnity. The action against Burch was dismissed without prejudice. Short did not file an answer. Briedenback answered, setting up that his tenant, who was the husband of appellant, was the owner of the property levied on and sold, and that all of the property had been in the rented premises for several months before the tenant became in default, and continued in them until a few days before the attachment was obtained, when it was removed to the warehouse of Dawson, with the intent to defraud him (Briedenback), and that he only directed the sheriff to levy on and sell the piano, office desk, and camera. Other pleadings completed the issues, and upon a trial the jury found a verdict against Briedenback for $700. This verdict was set aside by the lower court, and upon another trial appellant recovered judgment against Briedenback for $75. Appellant asks that the judgment on this verdict be set aside and a new trial granted her because (1) the verdict is against the evidence; (2) error in rejecting evidence; (3) error in giving and refusing instructions. Briedenback prosecutes a cross-appeal, and insists that, as the property upon which the attachment was levied was in the leased premises, it was subject to the land-

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lord's claim for rent, although the wife of the tenant might have been the owner of it.

Before considering these matters, we will dispose of the question as to the right of Briedenback to prosecute a cross-appeal from the judgment against him for $75; that being the only amount in controversy so far as he is concerned. The point has not been heretofore passed on by this court, and involves the right of an appellee to prosecute a cross-appeal when the amount in controversy as to him and the judgment from which he prosecutes the cross-appeal is less than two hundred dollars. Civ. Code Prac. section 755, provides: "Appellee may obtain a cross-appeal at any time before trial by an entry on the records of the Court of Appeals. The failure of an appellant to prosecute an appeal, or his dismissal of it, shall not prevent the appellee from prosecuting a cross-appeal." A cross-appeal can only be taken in this court. It cannot be granted by the circuit court. Murphy v. Blandford, 11 S. W. 715, 11 Ky. Law Rep. 125; Hancock v. Hancock, 69 S. W. 757, 24 Ky. Law Rep. 664. But, when the judgment below authorizes an appeal to this court by each party to the litigation—that is, when the amount in controversy as to each party without reference to the claim or judgment of the other, whether the action be at common law or in equity, is $200 or more, as for instance, where A. sues B. on a claim for $1,000 and gets a judgment for $500, or where C. sues D. for $500 and obtains a judgment for $200 or less, and a counterclaim or set-off that would make the amount in controversy as to D. $200 or over is rejected—either or both may pray an appeal in the lower court from the judgment, and may prosecute the appeal if they desire upon the same record or each may bring

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up his own record, and either or both may file a schedule. Allen County v. U. S. Fidelity & Guaranty Co., 122 Ky. 825, 93 S. W. 44, 29 Ky. Law Rep. 356. If the action is in ordinary, and the amount from which the appellee desires to prosecute an appeal is large enough to authorize him to take the appeal in the lower court, then he must in that court file his motion and grounds for a new trial, and in other respects follow the procedure that authorizes an appeal from a judgment of the lower court in ordinary actions, except that the appeal may be taken on the same record or either or both may file a schedule. L. & N. R. Co. v. Whitehead, 73 S. W. 1128, 24 Ky. Law Rep. 2315. If, however, the amount in ordinary actions is not sufficient to authorize an appeal in the lower court by the appellee, then he may without taking any action in the lower court prosecute a cross-appeal in this court, and in equity actions may prosecute in this court a cross-appeal without reference to the amount If the cross-appeal is granted by this court, the amount in controversy, so far as the person asking the cross-appeal is concerned, is not material. When the appellant brings the case here, the appellee may prosecute an appeal for the purpose of having correctly adjudicated all the questions disposed of adversely to his interest in the lower court, to the end that if there is a retrial of the case, the lower court may dispose of it without prejudicing the rights of either of the parties. If this practice was not allowable, and it was only competent to consider the points raised by appellant, and the case was remanded for a new trial, the errors committed to the prejudice of appellee might be repeated upon the retrial. Walsh v. Mayer, 111 U. S. 31, 4 Sup. Ct. 260, 28 L. Ed. 338; 2 Cyc. 583. Therefore we have

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jurisdiction to examine the question raised by Briedenback on his cross-appeal.

The personal property owned by the wife of a tenant on the leased premises cannot be subjected to the payment of the rent due by the husband, first, because section 2127 of the Kentucky Statutes of 1903, provides, in part, that "marriage shall give to the husband during the life of his wife no estate or interest in the wife's property real of personal, owned at the time or acquired after the marriage. During the existence of the marriage relation, the wife shall hold and own all her estate to her separate and exclusive use, and free from the debts, liabilities or control of her husband;" and, second, section 2305-07 of the Kentucky Statutes of 1903 specifies the persons whose property if found on the leased premises may be subjected to the rent, and, in the absence of a contract, the property of no other person that may happen to be on the leased premises can be taken. The section first mentioned provides that "rent may be recovered from the lessee or other person owing it or his assignee or undertenant, or the representative of either;" and section 2307 that "a distress warrant or attachment for rent shall bind and may be levied upon any personal property of the original tenant found in the county and upon the personal property of the assignee or undertenant found on the leased premises." The fact that appellant was the wife of the tenant, and that property owned by her was on the leased premises—it being immaterial how long it had been there—did not have the effect of making her an undertenant or render her property liable for the rent due by her husband. The rule of the common law has been changed by the statute. The rights of the landlord have been abridged, and

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his remedies, being fixed by the statutes, cannot be extended. Indeed, there is no good reason why they should be. The landlord is highly favored by law, and is given extraordinary remedies for the collection of his rent.

In view of the fact that there must be a retrial of the case, we do not express any opinion as to the ownership of the property, and will only make such comments upon the evidence as may be necessary to a proper understanding of the instructions given and refused.

There was evidence tending to show that the husband of appellant owned the piano, and also evidence that the articles were first put up and sold by the piece, and then as a whole, and that when sold as a whole they brought $203.40, which was more than they brought separately, and this latter bid was accepted. The piano and camera when sold separately brought more than the amount of Briendenback's debt; and there is some evidence that the sheriff was only directed by Briendenback to sell the piano and the camera. The jury returned the following verdict: "We, the jury, find for the plaintiff in the sum of $75.00 for camera." In view of the fact that there was controversy as to the ownership of the piano, and of the evidence that Briedenback only directed that the piano and camera be sold, it can readily be seen that, when the jury were told in every instruction that if they found at all for the plaintiff as against Briedenback they could only find the value of such goods as were procured to be sold by him, they must have come to the conclusion that the piano was not the property of the appellant, but that the camera was, and, as Briedenback had only procured the sale of the piano and camera, they were

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limited in their finding to the value of those two items, and did not consider at all the value of the other articles sold, all of which were claimed by appellant. No instruction was given as to the liability of the sheriff.

Briedenback had his attachment levied upon the property that was sold. Before the sheriff would sell the property, he required Briedenback to execute to him a bond of indemnity. This bond does not embrace all the property levied on or directed by order of court to be sold, but so far as this action is concerned, it is not material. This bond did not protect the officer from suit by appellant, who was claimant of the property. It is true the bond obligates Briedenback "to pay to any claimant of the property aforesaid the damage which he or she may sustain in consequence of such seizure or sale," but this part of the bond was not authorized by section 211 of the Civil Code of Practice under which it was taken. In attachment proceedings the sheriff or officer who has an attachment for execution may take for his own protection a bond of indemnity against any damage he may sustain by reason of the levy of the attachment, or sale of the attached property; but he is not authorized to take or demand a bond in the interest of any claimant of the property, nor does the bond protect the officer from suit by the claimant whose property he has wrongfully seized or sold. Lewis v. Mansfield, 78 Ky. 460; Gevedon v. Branham, 47 S. W. 589, 20 Ky. Law Rep. 792. It was entirely proper that the plaintiff should join in the same action as defendants the sheriff who sold the property, as well as the persons who procured him to sell it. Really the only question in this case, except as to the value of the property, is whether

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appellant was or not the owner of it. If she was the owner of it, she had a right to recover damages for its illegal seizure and sale from the persons who procured the sale as well as the officer who made it. If she was not the owner of it, then, of course, she should not recover. Dawson, under the evidence before us, was not liable, as it does not appear that he had anything to do with the sale of the property. It is true it was placed in his possession by appellant, but he surrendered it, as he had the right to do, to the sheriff who demanded it by virtue of the attachment in his hands. On another trial of the case, in lieu of the instructions given, the court should instruct the jury that (1) if they believe from the evidence that the property, or any part thereof, levied on and sold under the attachment was owned at that time by Georgia Fite, they should find against W. I. Short the reasonable value at the time of the seizure and sale of such articles as were owned by her. (2) If they believe from the evidence that Briedenback procured Short to sell the property owed by Georgia Fite, they should find against him the reasonable value of the property owned by her that he directed or procured the officer to sell. (3) If they believe from the evidence that the property sold by Short belonged to the husband of Georgia Fite, they should find for the defendants. (4) The court should instruct the jury that the defendant Briedenback is only responsible for the sale of such of the property as he directed the sheriff to sell. The appellee Short may, if he desires, file an answer.

The judgment on the cross-appeal is affirmed, and the judgment on the original appeal is reversed, with directions for a new trial not inconsistent with this opinion.

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CASE 53.—ACTION BY LILLIE L. WOOD, EXECUTRIX OF CHARLES W. WOOD, DECEASED, AND OTHERS AGAINST J. N. WOOD FOR A CONSTRUCTION OF THE WILL OF DECEASED.—December 12.

Wood, &c., v. Wood, &c.

Appeal from Nicholas Circuit Court.

L. P. FREYER, Circuit Judge.

From the judgment defendants appeal—Affirmed.

1. Wills—Construction—Presumption Against Partial Testacy.—It is presumed that a testator intended to dispose of his entire estate, and the law favors such construction as will carry such intent into effect.
2. Same—Estates Created.—Testator devised real estate to a sister for life with remainder to her children, gave property to his parents for life with gift over, and devised and bequeathed to his wife all the remainder of his estate, and declared that it was his request that his library should be kept intact for a specified period, and that, if at the end of that period his brother showed in the judgment of the wife sufficient promise, it was testator's desire that she should give the library to him, and further provided that it was his "request" that, should the wife die without heirs and the estate devised should be intact, she should will the same to such of his brothers and sisters as it might seem proper to her. Held, That under Ky. Stats., 1903, section 2342, providing that, unless a different purpose appears by express words or necessary inference, every estate in land created by will without words of inheritance shall be deemed a fee simple, the wife acquired an estate in fee.
3. Same—Precatory Trusts.—To create a trust and make precatory words operative in a will, it must appear that the estate is not an absolute estate; that the disposition thereof is not unrestricted; that the subject of the devise and the devisees are certain and the trust definite; that the language used is positive and imperative, and not such an indicates a mere

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desire on the part of the testator which may be complied with or not at the pleasure of the legatee.

4. Same.—Testator devised his residuary estate to his wife absolutely, and provided that "it is my request" that my law library be kept intact for a specified period, and "it is my further request" that my wife give the library to my brother if he shows in the judgment of my wife, "sufficient promise," and "it is my further request" that, should my wife die without heirs of her body and the estate devised to her be intact, she "will and devise" the same to such of my brothers and sisters as might seem proper to her. Held not to create a precatory trust.

JOHN C. STROTHER for appellant.

STROTHER & WYCOFF of counsel.

POINTS AND AUTHORITIES.

1. A fundamental rule in the construction of will is, that effect must be given as far as practicable to every part of the will in order to ascertain the intention of the testator. (Moran, etc., v. Dillehay, 8 Bush, 435; Peynado's Dev. v. Peynado's Ex., 82 Ky. 2; Morse, etc., v. Cross, 17 B. M., 735; Guthrie v. Turner's Ex., 14 Ky. Law Rep., 336.)

2. The appellee took only a life estate or a defeasible fee in the event of her death without heirs of her body. (22 Am. & Eng. Ency. of Law, 1171; Colton v. Colton, 127 U. S, 300; Cochrill v. Armstrong, 31 Ark., 580; Warner v. Bates, 98 Mass., 274; Foster v. Wilson, 68 N. H., 241; Daniel v. Thompson, 14 B. M., 533; Best v. Best, 88 Ky., 564; Degman, etc., v. Degman, etc., 97 Ky., 717; Carroll's Heirs v. Carroll's Heirs, 12 B. M., 637; Hamlin v. U. S Express Co., 107 Ill., 443.)

3. When there are repugnant or conflicting clauses in the will, the last clause prevails. (Hunt v. Johnson, etc., 10 B. M., 344; Nelson v. Nelson, 2 Ky. Law Rep., 64; Guthrie v. Turner's Ex., 14 Ky. Law Rep., 336.)

4. The will under construction in this case creates a precatory trust. (Bohon v. Barrett, 79 Ky., 382-3; Major v. Herndon, 78 Ky., 123; Harrison v. Harrison's Admr., 2 Gratt., 1; Anderson v. McCullough, 3 Head (Tenn.), 614; cases examined and distinguished: Sale v. Thornberry, 86 Ky., 266; Igo v. Irvine, 24 Ky. Law Rep., 1165; Webster v. Wathen, 97 Ky., 318; Goslee's Admr. v. Goslee's Ex., 29 Ky. Law Rep., 654.)

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5. The fact that the will contains apt words to devise a fee simple estate to appellee, does not negative the fact that a trust was intended to be created. (Sale v. Thornberry, 86 Ky., 268; Noe v. Kern, 93 Mo., 367, and cases cited in next point following.)

6. The direction of the will to appellee to devise the estate to such of testator's brothers and sisters as may seem proper to her, is valid and enforcible, and is not void for want of certainty. (Attorney General v. Wallace's Dev., 7 B. M., 611; Daniel v. Thompson, 14 B. M., 533; Black v. Herring, 79 Md., 146; Dexter v. Evans, 63 Conn., 58; Holsen v. Rockhouse, 83 Ky., 233; Under on Wills, p. 1152, section 792; Degman v. Degman, 98 Ky., 719; Handley v. Wrightson, 60 Md., 198.)

7. The distinction between a precatory trust and an attempt to devise an estate after devising a fee simple. (See Bohon v. Barrett, 79 Ky., 382; Hill on Trustees, p. 92; Perry on Trusts, chapter 4; 66 Penn., 402; 1 N. H., 228, as to precatory trusts and Cox v. Anderson's Admr., 24 Ky. Law Rep., 721, and Clay v. Chenault, 108 Ky., 77, as to the attempt to devise an estate after devising a fee simple.)

8. The second paragraph of the answer of J. N. Wood, individually, and as administrator of Nannie N. Wood, presented a valid defense.

9. The court erred in adjudging that appellee took a fee simple estate under the fourth clause of the last will of Charles N. Wood.

10. The court erred in striking out the second paragraph of the answer of J. N. Wood, individually, and as administrator of Nannie N. Wood, and in failing to construe the will in the light of the facts stated in that paragraph.

HOLMES & ROSS and JOHN P. McCARTNEY for appellee.

POINTS AND AUTHORITIES.

1. Lillie L. Wood takes the fee simple and absolute estate. (Wilkerson v. Chambers (Pa. Sup.), 37 A., 569; Kent's Com., vol. 4, 270; Clay v. Chenault, 21 Ky. Law Rep., 1485; Mitchell v. Morse, 77 Me. 423, 52 Am. Rep. 781; Ky. Stats., section 2342; Barth v. Barth, etc., 18 Ky. Law Rep., 840; McCallister v. Bethel, 97 Ky., 1; Cralle v. Jackson, 26 Ky. Law Rep., 417; Cox, etc., v. Anderson's Admr., 24 Ky. Law Rep., 721; Galloway, etc., v. Durham, 26 Ky. Law Rep., 445; Ramsdell v. Ramsdell, 21 Me., 288! Jackson v. Bull, 19 ohns, 20; Clay, etc., v. Wood, etc., 36 N. Y. Supp. 317, 47 N. E. 274; 2 Blackstone Com., 381,)

2. No precatory trust created by the will. (Mitchell v. Mitchell,

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143 Ind. 133, 42 N. E. 465; Second Reform Church v. Disbrow, 52 Pa. St., 219; Williams v. Worthington, 49 Md. 572, 33 Am. Rep. 286; Durant v. Smith, 34 N. E., 190; Story Eq. Jur., section 1069 et seq; Wright v. Adkyns, — Turn. & R., 157; Morse v. Bishop of Durham, 10 Ves., 535; Hill v. Page (Tenn.), 36 S. W., 735; Page on Wills, section 611; Aldrich v. Aldrich (Mass.), 51 N. E., 449; Pom. Eq. Jur., section 1610 and note; Foose v. Whitmore, 82 N. Y. 405, 37 Am. Rep. 572; Knott v. Cottee, 2 Phil., 192; Knight v. Knight, 3 Beaver R., 148; Jarman on Wills, 693; Pennock's Est., 59 Am. Dec., 724; In re Gardner, 23 N. Y. Supp., 35 N. E. 440; Ellis v. Ellis' Admr., 15 Ala. 296, 50 Am. Dec. 132; Hopkins v. Glunt, 111 Pa. St., 287; Howard v. Carusi, 109 U. S. 725, 27 L. Ed. 1091; Bryan v. Milby, 6 Del. Cha., 13 L. R. A. 563; Holmes v. Dally (Mass.), 78 N. E., 513; Leckmore v. Lavie, 2 Mylne K., 201; in re Whitcomb, 86 Cal. 265; 24 Pac. 1028; Sale v. Thornbury, 86 Ky., 266; Clay v. Chenault, 108 Ky., 105; Barth v. Barth, 18 Ky. Law Rep., 841; Cox v. Anderson, etc., 69 S. W., 953; Humphrey v. Potter, 70 S. W., 1063; Igo v. Irvine, 70 S. W., 837; Goslee's Admr v. Goslee's Exr., 29 Ky. Law Rep., 654; White v. Orvine, 24 Ky. Law Rep., 2458; Webster v. Wathen, 17 Ky. Law Rep., 32; Thurston, Admr., v. Prather, etc., 25 Ky. Law Rep., 1137.)

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

Charles W. Wood, a distinguished lawyer and citizen of Nicholas county, Kentucky, died in June, 1904. He left a will, which in due time was regularly probated, and his wife qualified as administratrix, and entered upon the discharge of her duties. The will disposed of a considerable estate, and, there being some question raised as to the interest which his wife, Lillie L. Wood, took under said will, she filed a suit in the Nicholas circuit court seeking a construction thereof. All of the other devisees named in the will were made parties defendant to the suit. Upon final hearing, the circuit court adjudged that Lillie L. Wood, by the terms of the will of her deceased husband, took a fee-simple title to all his property, except that specifically described in para-

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graphs 2 and 3 of said will. It was earnestly contended in the lower court by some of the devisees that Lillie L. Wood took only a life estate in said property, and, the court having decided adversely to their contention, they have prosecuted this appeal.

The will in question is in words and figures as follows:

"I, Charles W. Wood, of Carlisle, Nicholas county, Kentucky, do hereby make and publish this as my last will and testament.

"First: I will that all my just debts, including funeral expenses, be paid.

"Second: I will and devise to my sister, Maggie Wood Wheelock, of Troup, Texas, during her natural life and at her death to her children, share and share alike, a certain lot of real estate lying and being in the corporate limits of Troup, Smith county, Texas, a part of the Eason Gee League, being the same land conveyed to me by Ben Cross and wife by deed dated March 12, 1902, and recorded in said Smith county, in Book 75, page 332, to which deed a reference is made for a more particular description of said land. Said land shall be held by her free from the control and any debts of the husband now living, or which she may hereafter have, and the said land shall not be sold or mortgaged or in any way encumbered as it is now conditioned, or as the proceeds arising from it may hereafter be invested for a period of thirty years. The said land may be sold and re-invested in rent producing real estate but the same shall be done upon the order of a court of proper jurisdiction, and then only when it shall appear to said court to be to the best interest of the devisees under this section of this will. All accretions in value shall be held and treated as a part of the capital invested.

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"Third: I will and devise to my father and mother, J. N. Wood and Nannie M. Wood, during their natural life, the farm upon which they now reside, including all the farming implements and all the live stock thereon, except one horse named 'Jack.' It is my will that at the death of my father and mother or the one surviving the longest, that the income from said farm, or from the property in which the proceeds of it may be invested shall be used to maintain my sisters, Alice Wood, Nettie Wood and Lizzie Wood, so long as they remain single, and in the event of the marriage of any of them, the said income shall be used for the support of the other or others.

"In the event of the marriage of all of them or the death of those unmarried, the said farm or the property in which the proceeds may have been invested shall descend to my brothers and sisters, share and share alike.

'The property devised under this section of the will shall not be mortgaged or sold except the proceeds be re-invested in rent producing real estate, except so much, not exceeding $2,000.00, as may be necessary to procure a home for the devisees under this section. If so sold it shall be the duty of the purchaser to see that the proceeds are re-invested as herein provided.

"Fourth: I will, devise and bequeath to my wife, Lillie L. Wood, all the remainder of my estate, real, personal and mixed. Said estate consists of 137 1-2 acres of land in Nicholas county, Kentucky, and being the same land conveyed to me by W. T. Buckler and wife on October 29, 1901, and the deed for the same being recorded in Deed Book 19, page 235; also an undivided one-half interest in a tract of 105 acres of land conveyed to W. B. Ratliff and me by Frank P.

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Call on July 10th, 1900, the deed for the same being recorded in Deed Book 18, page 279. Reference is made to said deeds for a more particular description of said lands. Also certain houses and lots in Carlisle , Kentucky, on Main street, the whole block being abutted by Main street on the north, by the property of Cain Brothers on the west; by Sugar Tree alley on the south and by the lot of C. C. Ratliff on the east.

"My personal property consists of stock in the Mutual Trust Company, the Deposit Bank of Carlisle, Kentucky, and in the Van Buren Iron and Manganese Company, also my library and other personal belongings.

"All other property, if any, which may not have been specifically named and devised I give to my wife, Lillie L. Wood.

"Fifth: It is my request that my law library be kept intact for a period of five years, and if at that time my brother, B. H. Wood, shows in the judgment of my wife sufficient promise, it is my further request that she give to him the said library.

"It is my further request that should my wife die without heirs of her body, and the estate herein devised to her be intact that with the exception of the sum of $5000.00 she will and devise the remainder to such of my brothers and sisters as may seem proper to her.

"It is my further request that no monument exceeding the price of $250.00 be placed at my grave.

"Sixth: I nominate and appoint my wife Lillie L. Wood as executrix of this my last will and request that she be permitted to qualify without bond.

"It is my further request that no inventory of my estate be required to be filed, since there is but one

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legatee or devisee except the special bequests herein provided in sections two and three.

"In testimony whereof I have hereunto set my hand this January 2nd, 1904."

The testator had no children. He left surviving him besides his wife, appellants, J. N. Wood, his father, Nannie M. Wood, his mother, and his brothers and sisters, the other appellants. It will be observed that in item 2 of said will he provides a comfortable home for his sister, who was living in Texas, by giving her certain real estate to hold during her natural life, and at her death to go to her children, share and share alike. This clause of the will is so drawn that his sister, even though she desired to do so, could not sell or dispose of, or even encumber this property, which was intended to furnish her a home during her life. In item 3 he makes a commendable provision for his aged father and mother by giving to them the old home farm, with all of its farming implements and stock, save one horse, "Jack," which he reserved, and in this clause he provided, further, that, upon the death of both his father and his mother, the income from the farm, or other property in which the proceeds thereof might be reinvested in the event of a sale thereof, as provided for in this clause, should be used to maintain his three sisters, Alice Nettie, and Lizzie, so long as they remained single, and, as they married, if any of them should, the income from said farm should be used to support the other or others during the period that they remained single, and, in the event of the marriage of all of them or the death of those unmarried, then, in that event, the farm or the proceeds thereof should descend to his brothers and sisters, share and share alike. In Item 4 he devises to his wife, the appellee

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herein, all of the remainder of his estate, real, personal, and mixed. He then proceeds in this same clause to describe the property which he intended to pass to his wife, and at the close thereof he uses this language: "All other property, if any, which may not have been specifically named and devised, I give to my wife, Lillie L. Wood." This clause, therefore, clearly disposes of his entire estate except so much as had been previously disposed of in items 2 and 3.

It is insisted for appellee that, by this clause of the will, she takes the absolute fee-simple title to all of the property described therein; while, on the other hand, it is argued with much force for appellants that item 5 of said will shows clearly an intent on the part of the testator to limit the estate of his wife in the property devised to her to a life estate. The language referred to in item 5 is that, in which he requests his wife to keep his law library intact for a period of five years, and, if, at the end of that time, his brother, B. H. Wood, in her judgment shows sufficient promise, that she should give to him the library, and also the language that in the event his wife should die without heirs of her body, and the estate devised to her be intact, that, with the exception of the sum of $5,000, she should will and devise the remainder to such of his brothers and sisters as to her seemed proper. It is undoubtedly true that under the fourth clause of the will Lillie L. Wood is given the fee to all of the property which her husband owned except that which is specifically devised in items 2 and 3. No stronger language could have been used to give her an absolute estate in said property. In arriving at the intention of the testator, the will must be read as a whole, and each item must be read in connection with every other item thereof,

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and, where it can be done without doing violence to the evident intention of the testator, it should be construed as to uphold each clause of the will. In item 2 the testator created a life estate with remainder over upon the death of the life tenant to her child. In item 3 he created another life estate in favor of his father and mother, and, if they died before his single sisters, or any one of them married, then those remaining single were to have a life estate in this property, and upon the marriage or death of all of them then this property described in item 3 was to go in fee to his brothers and sisters or their heirs.

From the reading of these two clauses in the will, the conclusion is irresistible that the draughtsman knew perfectly well how to create a life estate, for he uses language about which there can be no mistake, words and terms which are susceptible of no double meaning; and, when he comes to that clause of his will which is the subject of contention in this litigation, to-wit, item 4, he uses language by which he shows an unmistakable intention to give to his wife an absolute estate in all of the property described therein. The question which naturally presents itself, then, is: What was the purpose of item 5 if it was not to limit in some wise the bequest made in item 4? It will be observed that the language in item 5 is very different from that which is used in items 2 and 3. Instead of the words "I give," or "I devise," he uses the words, "I request," etc., "that you give," etc., clearly indicating that the testator, while recognizing that the property was his wife's, desired, without attempting to control her action, to let her know what disposition thereof would be pleasing to him under certain conditions and in certain events. It is presumed that the testator intended to dispose

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of his entire estate, and the law favors such constructon as will carry into effect this intent. The construction sought by appellee disposes of the entire estate, whereas that sought by appellants leaves a portion of the estate undisposed of. Chancellor Kent, in his Commentaries (volume 4, p. 270), says: "If there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A. in fee and if he dies possessed of the property without lawful issue, the remainder over, or re mainder over of the property, which he dying without heirs should leave or without selling or devising the same, in all such cases the remainder over is void as a remainder because of the preceding fee, and it is void by way of executory devise because this limitation is inconsistent with the absolute estate or power of disposition expressly given, or necessarily implied by the will. A valid executory devise cannot subsist under an absolute power of disposition in the first taker." And in Mitchell v. Morse, 77 Me. 423, 1 Atl. 141, 52 Am. Rep. 781, it is said: "A devise of real estate without words of limitation vests in the devisee an estate in fee simple; and this result is not defeated by a devise over of the remainder. When by the terms of the devise an estate in fee simple is given, the addition of a devise over of a remainder is void, because, the whole estate having already been disposed of, there is nothing for it to act upon." Section 2342 of the Kentucky Statutes of 1903, is as follows: "Unless a different purpose appears by express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple or such other estate as the grantor or testator had power to dispose of." When we consider the language used in the fourth

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clause of the will in connection with the section of the statute above quoted, it is clear that Lillie L. Wood is the owner of the fee-simple title of the property described therein with full power of disposition. Her husband intended that she should have this property to do with as she pleased. As stated above, the testator was a lawyer of prominence, and had acquired a comfortable estate. During all of the years of his married life his wife had, no doubt, labored with him, and counseled and advised him in all of his undertakings. She had, most likely, aided and assisted him in accumulating the property of which he was making disposition, and it is but natural to suppose that when in item 4 he said he devised to her certain property that he intended that she should have it absolutely to do with as she pleased, and this idea is very much strengthened when items 4 and 5 are read in connection with item 6 of the will, which requests that no inventory of his estate be required to be filled, "since there is but one legatee or devisee except the special bequests herein provided in sections two and three." This legatee or devisee referred to in item 6 is none other than his wife, referred to in item 4.

In the case of Cox, etc., v. Anderson's Adm'r, 69 S. W. 953, 24 Ky. Law Rep. 721, this court, in construing the following language of the testator, to-wit: "I give, devise, bequeath to S. my wife, all of my cash, notes and lands and bank stock and my other stocks that I may have and also all my live stock, growing crops, house-hold and kitchen furniture, to have and to hold for her own use and benefit. When she, S. is done with it I give to Mt. Zion Church as an endowment $1,000.00 the proceeds of which are to go paying the expenses of the church"—held that:

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"The church could not recover said sum. After devising the fee-simple title to his wife, the subsequent expression of a desire to give a part of the same property to the church was ineffectual." To the same effect is Barth v. Barth, 38 S. W. 511, 18 Ky. Law Rep. 840; McCallister v. Bethel, 97 Ky. 1, 16 Ky. Law Rep. 774, 29 S. W. 745; Cralle v. Jackson, 81 S. W. 669, 26 Ky. Law Rep. 417. The case of Clay v. Wood, etc., 91 Hun, 398, 36 N. Y. Supp. 317, is very similar to the case at bar. In that case the will, after directing the payment of certain debts and particularly a mortgage debt upon the home of the testator, gave to the wife and her heirs and assigns forever the house and lot absolutely. Then, after making provision for sundry relatives, he devised the rest and residue of his estate to his wife and her heirs forever, and followed this devise with a request and desire that his wife should sustain and provide for one W., and should make said W. and certain other relatives of the testator joint heirs after her death in the estate bequeathed to her. The court, in construing this will, held that the wife took an absolute and beneficial interest in all of the property devised and bequeathed to her, and that the words in the final clause in the will gave no interest to the persons named therein, and created no trust for their benefit. The will in this case is so like the will under consideration that we quote from the opinion in this case at some length: "What was the dominant intention of Mr. Clay in making his will as he did? To discover that, we must take into consideration the whole scheme of the will, and weigh the expressions which he has made use of when defining the interest of his wife. * * * His general scheme was to give everything to his wife, upon his death, except the

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legacies which he gave by the third and fourth clauses. Where there is an absolute gift of real or personal property, in order to qualify it or cut it down, the latter part of the will should show an equally clear intention to do so. * * * That is a general rule; and can it be said of the concluding clauses of this fifth paragraph that it stands the test? We cannot think so. It undoubtedly contains the desire and request of the testator that his wife should make the persons named her 'joint heirs' after death; but, in view of the very emphatic and precise language which he had seen fit to employ in defining the estate which his wife should take in his property, it would be going too far in the effort to give effect to testator's desire to hold that it dominated his previous expressions of intention and affected their legal force and significance. * * * Whether the precatory words in a will shall be accorded such force as to deprive the donee of the absolute right of disposal, and thereby qualify the beneficial interest in the gift, must be determined in connection with what may be gathered from the rest of the will as an intention which would be reconcilable with the idea of a trust imposed upon the legal estate. When to impose such a trust would be to nullify previous expressions in the will, and to create a repugnancy between its different parts, then the rules of construction forbid the attempt. * * * Thus we see that the pivotal point of construction is as to the significance of the expressions used by the testator when giving his estate to his wife, and the inference to be drawn therefrom. In our view they are unmistakable, and create an atmosphere about the instrument of an entire subjection of the claims of others upon his bounty to the paramount claim of his wife, and to

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her ultimate testamentary disposition. In this case we can only read the language in which the testator expresses his desire and request in the light of the emphatic language previously used in the will, and, as so read, award to it the force of a suggestion and an expectation, which, however strongly phrased, were only morally binding upon the widow." In the case at bar, the testator in item 4 of the will used language which in unmistakable terms conveyed to his wife the absolute fee to the property described therein, and, adopting the language of the learned judge in the opinion just quoted, "we can only read the language in which the testator expresses his desire and request" in item 5 "in the light of the emphatic language previously used" in item 4 "and, as so read, award to it the force of a suggestion and an expectation, which, however strongly based, were only morally binding upon the widow."

We come next to a consideration of the question as to whether or not a precatory trust was created in the will. If the devise is in fee and absolute, precatory words following cannot cut down and destroy the absolute devise. Justice Story, in his work on Equity Jurisprudence (section 1069) says: "The doctrine of thus construing expressions of recommendation, confidence, hope, wish, and desire into positive and peremptory commands is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of the testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions, and words of positive direction and command; and that, in using the one, and omitting the other, he should not have a determinate end in view. It will be agreed on all sides that, where the intention

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of the testator is to leave the whole subject, as a pure matter of discretion, to the good will and pleasure of the party enjoying the confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion but not absolutely to control or govern it, there the language cannot and ought not to be held to create a trust. Now, the words of recommendation and other words precatory in their nature imply that very discretion as contradistinguished from peremptory orders; and therefore ought to be so construed, unless a different sense is forced upon them by the context. Accordingly, in modern times, a strong disposition has been indicated not to extend this doctrine of recommendatory trusts; but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense." Page on Wills, section 611, thus states the rule: "Where testator expresses a request or makes a suggestion as to the disposition at the death of the devisee of such property as the devisee does not dispose of during his lifetime, such words do not create a trust." In Pomeroy on Equity, section 1016, and note, it is said: "In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner. The modern decisions have adopted a rule and require the intention to exist as a fact and to be expressed in unequivocal language. No other conclusion can be

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reconciled with these general principles of construction which are based upon reason and universal experience." In order to create a trust and make precatory words operative in a will, it must appear that the estate is not an absolute estate, and that the disposition thereof is not unrestricted; that the subject of the devise and the devisees must be certain, and the trust definite, and the language used must be positive and imperative, and not such as would indicate a mere wish or desire on the part of the testator, which might be complied with or not at the pleasure or discretion of the legatee. The latest enunciations of this court upon this subject are the cases of White v. Irvin, 74 S. W. 247, 24 Ky. Law Rep. 2458; Igo v. Irvin, 70 S. W. 836, 24 Ky. Law Rep. 1165; and Goslee's Adm'r v. Goslee's Ex'r, 94 S. W. 638, 29 Ky. Law Rep. 654, and in each of these cases the principle above announced is clearly upheld.

Measured by this rule, we find that the will before us is lacking in all of the elements which go to create a precatory trust. In the first place, the estate is given to Lillie L. Wood absolutely; second, her disposition thereof is unrestricted; third, the devise is not definite, the devisees are uncertain, and the language is such as to indicate a mere desire and could not in any sense be construed to be a command.

For the reasons indicated, the judgment of the lower court is affirmed.

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CASE 54.—ACTION BY H. D. HUTCHCRAFT AGAINST THE LOUISVILLE RAILWAY CO. FOR DAMAGES FOR PERSONAL INJURIES.—December 13.

Louisville Ry. Co. v. Hutchcraft

127 531
130 443

Appeal from Jefferson Circuit Court; Common Pleas Branch; First Division.

EMMET FIELD, Judge.

Judgment for plaintiff, defendant appeals—Affirmed.

1. Street Railroads—Injuries to Travelers—Collision with Vehicle—Evidence—Verdict.—In an action for injuries to plaintiff in a collision between a vehicle in which he was riding and defendant's street car, evidence held to sustain a verdict for plaintiff.
2. Same—Duty of Railway Company.—Where a street car approached a vehicle on the track it was the motorman's duty to have the car under reasonable control, to keep a lookout ahead to avoid a collision, to give notice of the presence of the car by the ordinary signals, and to exercise ordinary care to avoid a collision and consequent injury to persons or vehicles.
3. Same — Contributory Negligence. — Where plaintiff, while driving a buggy, was injured in a collision with a street car through the negligence of the motorman, plaintiff was entitled to recover, unless his own negligence contributed to the injury and the motorman by the exercise of ordinary care could not have prevented the injury, notwithstanding plaintiff's negligence.

FAIRLEIGH, STRAUS & FAIRLEIGH and GREENE & VANWINKLE for appellant.

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POINTS AND AUTHORITIES.

1. The verdict and judgment are not sustained by sufficient evidence. (L. & N. R. R. Co. v. Price's Admr., 25 Ky. Law Rep., 1033, 76 N. W. 836; South Covington St. Ry. Co. v. Cleveland, 100 S. W.. 283; Lexington Ry. Co. v. Fain, 80 S. W., 463.)

2. Appellant was guilty of no negligence, in that its servant exercised all the care that was necessary under the circumstances.

3. Appellee was guilty of such contributory negligence as should bar a recovery on his part. (South Covington & Cin. Ry. Co. v. Enslen, 38 S. W. 850.)

CHAS. H. SHIELD, GEO. CARY TABB and RAY MANN for appellee.

POINTS AND AUTHORITIES.

The verdict and judgment are sustained by sufficient evidence. (So. Cov. & C. St. Ry. Co. v. McHugh, 25 Ky. Law Rep. 1112, 77 S. W. 202; Flynn v. Lou. Ry. Co., 23 Ky. Law Rep. 57, 62 S. W. 490; Lou. Ry. Co. v. Worley, 31 Ky. Law Rep. 96, 101 S. W. 926.)

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

Fourth street, in Louisville, runs north and south. Broadway runs east and west, crossing Fourth street at right angles. A double line of street car tracks are on Fourth street; the cars going south running on the west track, and those going north on the east track. On April 22, 1905, H. D. Hutchcraft was driving along Fourth street on the west side to take a young lady to the station on Broadway. He desired to turn around before the young lady got in; so, after reaching the house, he proceeded to turn around. In turning the buggy, he had to drive across the street car tracks. When he turned he saw a street car approaching him from the north and about 100 yards distant. When his horse reached the west track in

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making the turn, it became unruly. The motorman commenced ringing his bell, and this made the horse more unruly. The car was not checked in time, and ran into the buggy, turning it over, and throwing Hutchcraft out upon the pavement on his head, from which he sustained serious injuries. He sued the railway company to recover damages. The jury found for him, fixing the damages at $1,000. The court entered judgment upon the verdict, and the railway company appeals.

The chief complaint on the appeal is that the evidence does not warrant a recovery. G. R. Klein thus states the occurrence: "I was on the rear platform with the conductor, and when I saw the horse and vehicle it was on the track approaching. The vehicle was approaching the car, and the horse was cutting across the track, and the car was going at a good speed. I first saw the horse at a distance of 150 feet from the car, and the motorman rang his bell as the car approached on the horse. The ringing of the bell frightened the horse, and the horse commenced cutting up and was unmanageable. Mr. Hutchcraft turned off of the track and was cutting across the track at the time. He kept on in that direction, and he was standing up in his buggy, as you might say, seesawing the horse's mouth trying to stop him; but the horse was so unmanageable that he could not control him. The motorman kept on ringing his bell and did not try to put on his brakes until it was too late. He was within a few feet of the buggy when he first applied his brakes, and he did not make a full application of the brakes until they had struck the buggy and had passed the buggy. The car went 30 feet beyond the striking point of the buggy." John Gates, who was riding a bicycle on

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the street at the time and was near by, thus states: "I was going north on Fourth street, on the right-hand side of the street. There was a rig came up behind me and turned to the left, crossing the street. The horse started to cut up, and my attention was attracted to that, and I watched him. It seemed that the horse would not turn out of the track. It appeared that he wanted to go on the right-hand side of the street going north. The horse cutting up attracted my attention. I saw the horse and the rig and the street car collide. It lifted the buggy I should say 6 feet in the air and turned it upside down. Of course, by that time the street car had gone between me and Mr. Hutchcraft and the buggy where they collided, and I didn't see any more. By the time that I got there he was lying there, and people were assisting him. That is about all that I saw. Q. How far did this horse and buggy progress on the tracks before that collision occurred—how many feet? A. About 40 feet, I should say. Q. The buggy was going north? A. The buggy was going north. Q. And the car going south? A. The car going south." There are several other witnesses who more or less substantiate the testimony of Klein and Gates. On the other hand, the motorman and one or two other witnesses for the defendant testify in substance that the horse was unruly, and, after getting out of the way of the car, pulled the buggy back toward the track just before the car reached it, and that the collision would have occurred if the car had been standing still. It is the peculiar province of a jury to weigh conflicting testimony. They not only hear the witnesses, but they see them. The judgment of 12 men accustomed to practical affairs ought rarely to be disturbed on a question like this. From all the evi-

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dence and the circumstances, the verdict of the jury seems fairly warranted.

The court gave the jury the following instructions: "It is the duty of the defendant's agents, in charge of the car as it went south on Fourth street at the time mentioned in the petition to have the car under reasonable control, to keep a lookout ahead to avoid injury to people or collision with vehicles that were upon the street, to give notice of the presence of the car by the ordinary signals, and to exercise ordinary care to prevent injury to people or vehicles who were on the street; and if you shall believe from the evidence that the motorman in charge of the car failed to exercise any one of these duties, and that by reason of that failure the plaintiff sustained the injuries of which he complains, then the law is for the plaintiff and you should so find, unless you shall believe from the evidence that the plaintiff was negligent, and that by reason of his negligence he helped to cause or bring about the injury of which he complains. and when, but for which negligence upon his part, if any there was, he would not have been injured. (2) But, if you shall believe from the evidence that the agent of the defendant in charge of its car exercised the duties that I have spoken to you of as being incumbent upon the agents in charge of the car, then the law is for the defendant, notwithstanding the fact that the plaintiff may have received the injuries of which he complains. (3) It was the duty of the plaintiff, as he came north upon the occasion mentioned in the petition toward the street car with which the collision was had, to exercise ordinary care for himself, and to exercise ordinary care in the control of the horse that he was driving; and if you shall believe from the evidence that he failed

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to exercise that degree of care, either for his own safety or in the management of the horse that he was driving, and that by reason of that fact he helped to cause or bring about the injury of which he complains, and that he would not have been injured but for such failure upon his part, or that contributory negligence upon his part, if such there was, then the law is for the defendant, unless you shall further believe from the evidence that the defendant's agents in charge of the car—the motorman—could by the exercise of ordinary care have seen the plaintiff's peril in time to have avoided or prevented the injury by the use of ordinary care to that end. If such is the fact, the law is for the plaintiff."

These instructions admirably stated the law of the case to the jury. The trouble occurred in the daytime. Passengers on the car saw the horse cutting up on the track 100 or 150 feet from the car. The car could have been then stopped long before it reached the buggy; but its speed evidently was not much checked, for it knocked the buggy up 6 feet in the air and ran 30 feet after colliding with it. In South Covington, etc., R. R. Co. v. Cleveland, 100 S. W. 283, 30 Ky. Law Rep. 1072, we sustained a recovery on facts not so strong as those in this case.

Judgment affirmed.

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CASE 55.—ACTION BY THE COMMONWEALTH AGAINST THE HOME & SAVINGS FUND COMPANY BUILDING ASSOCIATION TO RECOVER TAXES ON ALLEGED OMITTED PROPERTY.—December 13.

Commonwealth v. Home & Savings Fund Co. Bldg. Assn.

Appeal from Jefferson Circuit Court; Common Pleas Branch; Second Division.

THOS. R. GORDON, Judge.

Judgment for defendant, Commonwealth appeals—Reversed.

1. Building and Loan Associations—Description.—Building and loan associations are a peculiar kind of corporation usually composed of aggregations of people dealing exclusively among themselves in accumulating a savings fund for investment in homes, more in the nature of limited co-operative home building copartnerships than commercial bodies.
2. Taxation—Building and Loan Stock.—Under Ky. Stats., 1903, section 4093, providing for the taxation of building and loan shares to the shareholders to the amount paid in and not withdrawn on September 15th of each year, provided that borrowing members should not be required to list their shares, if the amounts borrowed equalled or exceeded the amount paid in on the shares, members are only taxable on the amount of their stock remaining in the association on the date specified over and above the amount of any loan or withdrawal that may have been made on such stock.
3. Same—Notes and Bonds from Borrowing Members.—Under Ky. Stats., 1903, section 4093, providing for the assessment of shares in building associations, and section 4094, providing for the assessment to the association of its surplus funds and undivided profits, the association is not taxable on notes and bonds given by borrowing members to secure loans from the association.

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4. Same—Bond Issue.—Where it was not shown that money raised by a building and loan association on bonds, and loaned out on mortgages, was a part of the association's "surplus" or undivided profits, it was not taxable to the association under Ky. Stats., 1903, section 4094, providing that such associations should list only surplus funds and undivided profits for taxation.
5. Same—Undivided Earnings.—Ky. Stats., 1903 section 4094, declares that each building and loan association shall list with the assessor the amount of its surplus fund and undivided profits on hand and undistributed on September 15th of every year. Held, That undivided profits on hand on such assessment date, less the payment of current indebtedness as of that date, were taxable, notwithstanding the association's distribution dates were January 1st and July 1st, respectively.

JOHNSON & HIATT for the Commonwealth.

JOHN S. JACKMAN for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

This was a proceeding in the Jefferson county court by the auditor's agent against appellee, a building and loan association organized under the laws of this State, to have assessed for taxation for county and State purposes what was claimed by the auditor's agent to constitute parts of the surplus fund and undivided profits of the association which had been omitted in its tax assessment for the years 1901 to 1905. Upon the agreed facts which will be adverted to presently, the county court refused to list the assets mentioned, which action, upon appeal to the circuit court, was affirmed.

Omitting from the agreed statement of facts what appears to us to be mere bookkeeping features, the following, for the year 1904, will serve to illustrate

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the situation, showing assets and liabilities of the corporation for that year, as of September 1, 1904:

Assets.

Mortgage Loans		$777,500 00
Pass Book Loans		15,658 00
Real Estate		2,591 30
Total Assets		$795,749 30

Liabilities.

Cash overdrawn	$ 6,522 70	
Dues	653,000 04	
Paid up stock	47,500 00	
Bonds outstanding	64,900 00	
Interest on bonds	1,298 00	
Sundry expenses	40 00	$773,268 74
Excess of assets over liabilities		$ 22,480 56
Reserve Fund	$10,918 94	
Balance	11,561 62	$ 22,480 56
Total Assets		$795,749 30

Paid in by stockholders:

Dues	$653,000 04	
Paid up stock	47,500 00	$700,500 04
Surplus and undivided profits		$ 95,249 26

Amount listed by taxation 1905:

Personalty	$ 11,068 94	
Real Estate	3,070 00	$ 14,138 94
Balance		$ 81,110 32

Now it is contended by appellant that the difference between the book assets and stock liabilities of the association constituted its undivided profits and

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surplus, being $95,249.26: that, as only $14,138.94 were assessed ($3,070 of the sum representing real estate), the balance of $81,110.32 is the unassessed or omitted surplus and undivided profits.

It becomes necessary at this point to examine the statutes under which this assessment was made. They are:

Section 4093, Ky. Stats., 1903: "That the shares of building associations or building and loan associations shall be taxed as other individual personal property, and shall be listed with the assessor for that purpose by the owners of said shares, the amount so listed by every owner or shareholder to correspond with the amount paid in and not withdrawn by the said shareholders on the fifteenth day of September of every year: Provided, that the borrowing members shall not be required to list their shares, if the amounts borrowed by certain members equal or exceed the amount paid in on their respective shares. The shares of infants shall be listed by the parents or guardians of such infants."

Section 4094, Ky. Stats., 1903: "The president or secretary of every such building association or building and loan association shall list with the assessor the amount of such surplus funds and undivided profits as the association may have on hand and undistributed on the fifteenth day of September of every year."

It will be at once perceived by those who are familiar with the taxing statutes of this State that there is not only a specific, but a different, mode provided for assessing building association shares and other property. But the difference exists only in the method of assessment. There was neither purpose nor power in the Legislature to discriminate in favor

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of either class. The general policy of taxation in this State is to tax all property once, and once only, for each fiscal year. It is well recognized that, in spite of the minute pains of the Legislature and taxing officials, it sometimes happens that some property is not taxed at all, while other kinds are sometimes indirectly taxed twice. Still, the general purpose prevails, and it is believed is attained. It must be conceded that the Legislature has, and must have, a free hand in adopting methods of assessment best calculated to further the great purpose of equal and just taxation. It must be manifest that no system could well be adopted applicable alike to all property that would afford equal taxation. The system of assessment adapted to one kind of property would be wholly inadequate for another kind. Numerous instances are afforded by the statutes of such dissimilarity.

Building and loan associations are a peculiar kind of corporation. They are usually aggregations of people who deal exclusively among themselves in accumulating a kind of savings fund for investment in homes. They are not commercial bodies in the large or popular sense of the term. They are, rather, limited, co-operative, home building co-partnerships. The chapter of the statutes providing for their organization treats them differently from other corporations. So the taxing statutes treat them with respect to their real character. It is recognized that property invested in such associations should be taxed once for each unit of government under which it exists. In devising a just system of reaching this property, and to tax it only once, the Legislature has looked below the mere apparent thing, and ignored as far as was practical, the corporate entity. It

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required the shareholders' or members' interest to be assessed against such owner, where it was susceptible of a separate valuation. To that end it required all shares of association stock to be assessed to the shareholders. It fixed the sure method of valuation, of assessing each share at what had been paid in on it and not withdrawn by the member. Obviously, if a share nominally rated at $100 had paid in on it only $10, its assessable value ought not to be greater than $10, because that is all that it could be worth, and is all the property that the shareholder owns in that form of investment. But if the shareholder has withdrawn $5 on that share, then what he has left in that investment is only $5. He should be taxed on that sum as represented in the building and loan share, and no more. The $90 not yet paid in ought not to be taxed, because it does not represent property at all; at most, it is only a liability. Nor should the $5 withdrawn be taxed as a share value, because it is no longer there. For the same reason, if the member has withdrawn the total sum invested in the share, evidenced by a loan or withdrawal, he ought not to be taxed upon that share, because its value as property has been extinguished, and that which once gave it value, to-wit, the sum paid in on it, has been withdrawn and invested elsewhere, where it doubtless pays a tax. But there may be an accumulation in the hands of the association above the sums paid in on each share, and which, until divided among the shareholders, none of them can be said to have an exclusive right to. This fund, whether it be a surplus which the association carries as a guaranty against losses, or for the profit of the members, not being otherwise taxed, is assessed as against the association. That part of the accumula-

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tions in addition to surplus, and out of which dividends may be apportioned to the shareholders, is likewise assessed against the association.

But the object of the association is to loan its funds to its members, out of which loans they build houses upon their lots. As some may borrow more than they have paid in on their "shares," thus anticipating their own payments on their share subscriptions, they secure their obligation to continue paying on their shares till they are matured, by mortgage on their land. These obligations, whether they are called mortgage notes or mortgage bonds, are primarily to secure the obligor's agreement to continue paying in on his share subscription until it has come to be equal to its par value, at which time his obligation is fulfilled. In this co-operative plan by which the weekly or monthly installments, small in each instance, but considerable in the aggregate, are loaned to one another by the membership, in their co-operative capacity, it is at last each one's furnishing the means to build his own home. For that reason the notes and bonds of the corporation are not made assessable under the statute. The property which they represent must from its very nature surely be subject to taxation. The Legislature saw that to tax such notes, and to tax the corporate shares, too, would be double taxation in its worst form, for that would tax both the member's property, and his indebtedness representing its value. The statute has been upheld in not taxing such notes as being not in contravention of the provision of the Constitution that all property shall be taxed. Commonwealth v. Fayette Building Ass'n, 71 S. W. 5, 24 Ky. Law Rep. 1223.

It was pointed out in argument that some property

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holders are taxed upon the value of their property without being allowed to deduct their indebtedness constituting a lien upon the property, although such debt was also taxed in the hands of the creditor. From this it is claimed that a discrimination is worked in favor of members of building and loan associations. We think it is exceptional in our tax system when the result is that the property holder is taxed upon his indebtedness, or rather upon his property in spite of his indebtedness. Property may assume so many different forms that it is difficult, if not impossible, to devise a plan by which none would escape taxation. For that reason, probably, legislators are always careful to lay hold upon that form which is least apt to escape assessment. Tangible property is therefore nearly always taxed. As the holder of mere choses in action may in so many ways elude listing them, or may even be beyond the taxing jurisdiction, if the debtor were allowed to deduct them it would frequently happen that the primary property would be excused, while its secondary form (the debt) would escape. It may be that some such consideration has deterred the Legislature in the past from allowing such deductions, although it was recognized that frequently double taxation (though not against the same owner) would ensue. But where it is sure, as in the case of domestic building associations confining their operations to the legitimate business for which they were formed, that no escape from taxation is possible by the failure to assess the real value of the property in one form or another, it is both permissible and proper (if we may express an opinion concerning a matter purely legislative) that the deduction should be allowed. There is enough of difference between such properties and the

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peculiar form of indebtedness upon them to the association, and property generally indebted, to uphold the distinction recognized by the Legislature in providing different modes of assessment, to support the classification as reasonable and natural. A wise government taxes property, not liability. It taxes a man upon what he has, not upon what he has not. If the member of the association has a lot unimproved, it is taxed at its value. If he has invested his earnings in shares in a building and savings association until he can have accumulated enough to begin the building of a house, such accumulation in the hands of the association is taxed as against him. If he "borrows" from the association, withdrawing all he has paid in, and anticipating his future payments, such sum is necessarily invested in the real estate which is pledged to secure his obligation. He pays then upon the enhanced value of the real estate; enhanced by employing this very money in building a house upon the lot. Thereafter he is not taxed upon his "shares," because thenceforth they represent, not property, but debt. However, he is taxed upon his lot, although some part of it may also represent debt; but that is inevitable, and is in accordance with the State's plan of taxation as generally exercised. Besides, the "nonborrowing" members of the association pay taxes upon their share investments, which are invested in the loans to the "borrowing" members. Thus it is seen that every feature of property owned by anybody in these ventures is taxed certainly once. The scheme of taxation is legitimate, just, and not discriminatory.

It is true some loans are made upon "pass books," meaning that the association has allowed its "borrowing" member to temporarily withdraw a part of

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his share investment. But he nevertheless pays taxes upon what is left in the association, represented by his shares, and the debt, so-called, is only another form of his obligation to mature; that is, pay up in full his share subscription.

It further appears in this case that appellee issued bonds and sold them, of which $64,900 are now outstanding. Appellant contends that in the item of $777,500 of loans is the money realized from the bond issue, and hence that, to the extent that borrowed money is loaned out on mortgages, the latter should be taxed as against the association. A sufficient answer to this contention seems to be that the statute does not authorize such an assessment against the association unless it be among either its "surplus" or "undivided profits." There can be legally neither surplus nor undivided profits so long as there is an indebtedness against the association above its assets. But it is contended that there was for the year 1904, as shown in the statement above, a difference of $22,480.56 between assets and liabilities, of which $10,918.94 was set apart as a reserve fund by the association (and which was duly listed by it), leaving $11,561.62 of earnings not listed. Appellee contends that this balance should not be regarded as taxable until after the period of distribution, viz., January 1st or July 1st, and the county court and circuit court each so held. But we think whatever was on hand on September 15th (now September 1st) of undivided earnings is taxable against the association. But as the undivided earnings are subject to the payment of current indebtedness against it as of that date, and as the statute clearly indicates that only the surplus earnings were intended to be taxed, we think current indebtedness should be deducted.

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The apparent difference between assets and stock liabilities is shown on the statement above to be $95,249.26. From this should be deducted bonds outstanding of $64,900, balance $30,349, which should be further credited by cash overdrawn by the association, and which it was owing its bankers $6,522.70, interest on bonds $1,298, sundry expenses $40, balance undivided $7,860.70, profits and surplus $22.488.56. Of this sum there was listed by the association personalty $11,068.94, real estate $3,070, total $14,138.94, balance $8,349.62, which sum we hold was assessable as undivided profits for the year 1904, and should have been listed, but was omitted by the association.

Without setting out here the detailed calculation, we will add that, following the same principle, for the year 1900, there was omitted $2,433.07; for 1901, $1,731.25; for the year 1902, $4,357.54; and for the year 1903, $5,819.46.

The judgment is reversed, and cause remanded for proceedings consistent herewith.

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CASE 56.—PERSONAL INJURY ACTION BY MRS. FRANK OVERFIELD AGAINST THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.—December 13.

Cumberland Tel'p & Tel'g Co. v. Overfield

Appeal from Henderson Circuit Court.

J. W. HENSON, Circuit Judge.

Judgment for plaintiff, defendant appeals—Affirmed.

1. Trial—Reception of Evidence—Order of Proof—Plaintiff—Deposition.—Civil Code Prac., section 606, subdivision 3, declaring that no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief, nor in an equitable action after taking other testimony for himself in chief, did not prohibit the reading of plaintiff's deposition after several witnesses had testified for her in chief, where her deposition was taken before such witnesses testified.
2. Same—Instructions—Assumption of Fact.—An instruction to find for defendant telephone company, unless, while plaintiff was driving along the road, she came in contact with a wire belonging to defendant, and which defendant had negligently permitted, if it had done so, to hang over and near the roadbed, and obstruct the travel thereon, did not assume that defendant telephone company "negligently permitted" its wire to hang over the road and obstruct public travel.
3. Damages — Pleading — General Damages. — General damages need not be averred, being such as the law presumes to have accrued from the wrong.
4. Same.—A petition in a personal injury action, alleging that plaintiff was thrown with great force from her buggy, rendering her unconscious, severely injuring her head and neck, wrenching and spraining her spine, bruising, spraining, and laming her right leg and arm, cutting and bruising painfully her face, and causing great internal injury and physical and

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mental shock, and that she was permanently disabled and her health permanently impaired, was sufficient to authorize a recovery for a permanent reduction in power to earn money; it being a necessary incident of permanent disability.

5. Same—Evidence—Sufficiency—Impairment of Earning Capacity.—In a personal injury action, evidence that prior to the accident plaintiff was in good health and had done the cooking, washing, ironing, and general housework for a large family, and that thereafter she was unable to perform any of those duties, authorized a recovery for permanent reduction in power to earn money, the extent thereof to be determined by the jury from their common knowledge and experience.

6. Appeal—Review—Harmless Error—Instructions.—In a personal injury action, defendant contended that error in instructing to find "also a reasonable compensation for the time she has lost from her business, if any, by reason thereof," was not cured by erasing those words from the instruction, after the conclusion of the argument and just as the jury was retiring. It did not appear that defendant asked permission to reargue the case, and the court not only erased the objectionable words, but admonished the jury to disregard them. Held, That defendant was not in any way prejudiced.

7. Evidence—Opinion Evidence—Subjects of Expert Testimony —Permanency of Injuries.—In a personal injury action, the permanency of injuries shown may be proved by the opinion of a physician.

8. Damages — Evidence — Sufficiency — Personal Injuries.— Evidence, in a personal injury action, held to justify a finding both as to the character of plaintiff's injuries and the cause thereof in accordance with her contention.

9. Same—Excessive.—After the accident, plaintiff was up a few times, but finally went to bed, and was thereafter confined to her room. She suffered a great deal. The accident produced a concussion of the brain and spinal cord, and a functional derangement of the bladder, and she was partially paralyzed in her right leg and arm, and at the time of the trial, more than a year after the accident, she was in a helpless condition, and her injuries were permanent. Held, That a verdict of $7,500 was not so excessive as to justify a reversal.

YEAMAN & YEAMAN for appellant.

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W. L. GRANBERRY of counsel.

POINTS AND AUTHORITIES.

1. Plaintiff having the burden, her testimony should have been first presented to the jury, and not after eight or ten of her other witnesses had testified in chief. (Civil Code, section 606, sub-section 3; Am., etc., Co. v. Bayless, 91 Ky., 103; Barkley v. Bradford, etc., 100 Ky., 306; L. & N. v. Lucas' Admr., 98 S. W. 308, 30 Ky. Law Rep. 359.)

2. Instruction No. 1 assumes that the defendant "negligently permitted" its wires to hang over the public road.

3. The instruction to find for the plaintiff "for any permanent reduction in her power to earn money" was error, there being no averment or proof justifying it. (E Chit. Pl., 308; Newman Pl. & Pr., 507; So. Covington v. Ware, 84 Ky., 267; L. & N. v. Mason, 24 Ky. Law Rep. 1623, 72 S. W. 28; Jesse v. Shuck, 11 Ky. Law Rep., 463; L. & N. v. Reynolds, 24 Ky. Law Rep. 1402, 71 S. W. 516; Barries v. L. E. L. Co., 25 Ky. Law Rep. 203, 80 S. W. 814; C. & N. Ry. Co. v. Hammer, 23 Ky. Law Rep. 1846, 66 S. W. 375; I. C. Ry. Co. v. Hanberry, 23 Ky. Law Rep. 1867, 66 S. W. 417.)

4. The error in instructing the jury to find "also a reasonable compensation for the time she has lost from her business, if any, by reason thereof," was not cured by erasing those words from the instruction after the conclusion of the argument on both sides, and just as the jury was retiring to consider their verdict. (Civil Code, section 317, sub-section 5.)

In the cases of Powers v. Comth., 22 Ky. L. R. 1807, 61 S. W. 735; Scott v. Comth for etc., 93 S. W. 669-70, 29 Ky. Law Rep., 776, ample opportunity was afforded counsel on both sides to discuss the instructions as finally corrected.

5. A verdict for $7,500 for personal injury caused by being thrown from a buggy, with no proof of its permanency, and no evidence or instruction authorizing punitive damages, is flagrantly excessive. (Railroad Co. v. Monogue, 90 Ky. 369, 12 Ky. Law Rep. 378, 14 S. W. 357; L. & N. v. Long, 94 Ky. 415, 15 Ky. Law Rep. 199, 22 S. W. 747.)

N. POWELL TAYLOR for appellee.

QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. That it was not error to permit plaintiff to read deposition of plaintiff after introducing other witnesses for plaintiff. It was

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not violative of the "rule of practice," nor prejudicial to the substantial rights of defendant. (Civil Code, section 606, sub-section 3; Am. & Eng. Ency. of Law; vol. 13, p. 3, Bouvier's Dict.; Am. Wire Nail Co. v. Bayless, 91 Ky., 103; Barkley v. Bradford, 100 Ky., 106; L. & N. R. R. Co. v. Lucas' Admr., Ky. Dec., 98 S. W., 308.)

2. That the first instruction did not "assume that the defendant had negligently permitted its wire to hang over the road." (Powers v. Comth., 22 Ky. Law Rep., 1812.)

3. Under an allegation of permanent injury, and permanent impairment of plaintiff's health, an instruction "for any permanent reduction in power to earn money" is proper without a specific averment. That general damages need not be specifically alleged. (So. Cov. & Cin. St. Ry. Co. v. Bolt, etc., 22 Ky. Law Rep., 906; Alexander v. Humber, 8 Ky. Law Rep., 619; Brown v. Ry. Co., 99 Mo., 310; Cyc. 13, p. 183; Maxwell on Code Pleadings, p. 79;; Bradbury v. Benton, 69 Me., 109; Wat. Per. Injuries, pp. 383, 639, 642, 818 and 819; 28 S. W., 110; 39 S. W., 638; 37 S. W., 771; 88 Ga., 647.)

4. That appellee, though not a "money earner," was entitled to compensation for any permanent reduction in her power to earn money in the future. (Lex. Ry. Co. v. Herring, Ky. Dec., 96 S. W., 562; So. Cov. St. Ry. Co. v. Core, Ky. Dec., 96 S. W., 564; Sutherland on Damages, vol. 3, section 1251.)

5. That it is not error for the trial court to withdraw any objectionable matter from an instruction, under proper admonition, after argument, and before final submission to the jury. That it is the right and the duty of the court to so amend its instructions as to correctly state the law. (Scott v Fidelity Co., 93 S. W., 669-670; Powers v. Comth., 22 Ky. Law Rep., 1807; 61 S. W., 735.)

6. That the physician who treated the plaintiff may give in evidence his opinion as to the permanency of her injuries. (Wat. Per. Inj., p. 604; Elliott on Evidence, vol. 3, section 1988.)

7. That the physician who was called to treat plaintiff, before suit was brought, may upon the trial give his opinion as to whether plaintiff's condition resulted from the injuries described to him by plaintiff. (24 Am. St. Rep., 194; Omberg v. U. S. M. A., 101 Ky., 303; Freeman v. Mer. Mut. Acc. Assn., 156 Mass., 351; Dabbart Case, vol. 4, 366, Biglow's Life and Acc. Ins. Rep.)

8. This court will not disturb the verdict of a properly instructed jury unless the verdict is so palpably and glaringly excessive or contrary to the evidence, as at first blush to indicate it was inspired by passion or prejudice. (23 Ky. Law Rep., 2342; Ky. Dec.; 92 S. W., 9, Ky. Dec.; 96 S. W., 560.)

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9. That the verdict of $7,500 was not excessive; that it is abundantly supported by the evidence, and was not inspired by passion or prejudice. (C. O. Ry. Co. v. Davis, 22 Ky. Law Rep., 748—$10,000; L. & N. R. R. Co. v. Mitchell, 87 Ky., 327—$10,000; City of Louisville v. Keber, 25 Ky. Law Rep., 2004—$7,500; L. & N. R. R. Co. v. McEwan, 21 Ky. Law Rep., 487—$12,000; City of Louisville v. Bailey, 25 Ky. Law Rep., 6—$7,000; Cleveland St. R. Co. v. Miller (Ind.), 74 N. E., 509—$7,500; Galveston H. & S. Ry. Co. v. Vollroth (Tex.), 89 S. W., 279—$14,000; Mo., K. & T. Ry. Co. v. Nail (Tex.), 58 S. W., 165—$8,430; Wilmette v. Brackle (Ill.), 71 N. E., 41—$8,500; City of Chicago v. Bush, 3 Ill., 638—$7,500; Bourland Co. v. Graham, 89 N. Y. S., 595—$9,000; Kansas City v. O'Neil (Mo.), 77 S. W. 64—$7,500; Pittsburg, C., C. & St. L. Ry. Co. v. Banfill (Ill.), 69 N. E., 177 (1903)—$20,000; City of Spokane v. Durham (Wash.), 68 P., 383—$12,000; Brocklyn Heights R. Co. v. Leonard, 67 N. Y. S., 985—$12,000; Chitty v. St. Louis, I. M. & S. Ry. Co. (Mo.), 65 S. W., 959—$10,000; Central Tex. & N. M. Ry. Co. v. Gibson, 83 S. W. 862—$8,800; Alabama So. Ry. Co. v. Crowder, 130 Ala., 256—$15,000; Goldsmith v. Holland Bldg. Co. (Mo.), 81 S. W., 1112—$8,500; Chicago & W. I. R. R. Co. v. Doan, 93 Ill. App., 247—$8,500.)

OPINION OF THE COURT BY WM. ROGERS CLAY, Commissioner—Affirming.

Appellant, Cumberland Telephone & Telegraph Company, owned and operated a telephone line along the Dixon and Henderson road, in Henderson county, Ky. The wire at the place of the accident which will be hereinafter described was attached to the limb of a tree on one side of the road, and to a fence post on the other, and hung so low as not to permit a buggy with a top to pass under it. This condition of the wire was known to appellant for some time prior to the accident to appellee. On December 7, 1905, appellee was driving a gentle horse along the road, when her buggy came in contact with the wire. The horse became frightened, and, after rearing and plunging several times, finally ran away. The wire cut through the bed of the buggy below the seat, and

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hurled the top of the buggy and appellee to the ground, inflicting upon her certain injuries which will be hereafter discussed.

On April 1, 1906, appellee instituted this action to recover of appellant damages for her injuries. The first trial took place in September, 1906, and resulted in a hung jury. The second trial, which occurred in February, 1907, resulted in a verdict for appellee in the sum of $7,500. A new trial was refused, and the Cumberland Telephone & Telegraph Company is here on appeal with the following assignment of errors: (1) The court erred in permitting the deposition of appellee, plaintiff below, to be read to the jury after several witnesses had testified for her in chief. (2) Instruction No. 1 assumes that appellant, defendant below, "negligently permitted" its wire to hang over the road and obstruct public travel thereon. (3) The instruction to find for appellee "for any permanent reduction in her power to earn money" was error, as there was no averment nor proofjustifying it. (4) The error in instructing the jury to find "also a reasonable compensation for the time she has lost from her business, if any, by reason thereof." was not cured by erasing those words from the instruction after the conclusion of the arguments on both sides and just before the jury retired. (5) A verdict for $7,500 for personal injury, caused by being thrown from a buggy, with no proof of its permanency, and no evidence nor instruction authorizing punitive damages, is flagrantly excessive.

These alleged errors will be considered in their order.

1. It appears that the deposition of appellee taken on September 1, 1906, was read in evidence over the objection of appellant, after some eight or nine wit-

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nesses had previously testified for her in chief. Appellant contends that subsection 3 of section 606 of the Civil Code of Practice prohibits such practice. That provision is as follows: "No person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief, nor in an equitable action, after taking other testimony for himself in chief." The manifest object of this provision was to prevent a party to a suit from sitting by and hearing his own witnesses, and then taking the stand in his own behalf and supplying the deficiencies in their testimony. This section of the Code should be interpreted in the light of the purpose for which it was enacted. To testify is to make a solemn declaration on oath or affirmation, for the purpose of establishing or making proof of some fact (Nash. v. Hoxie, 59 Wis. 388, 18 N. W. 408), and it signifies the giving of testimony whether orally or in writing (Case v. James, 90 Wis. 320, 63 N. W. 237). In this sense it is used in the above section of the Code, for it provides that a party shall not testify for himself in chief in an equitable action, where testimony is usually taken by deposition, after taking other testimony for himself in chief. We are therefore of the opinion that, so far as this provision of the Code is concerned, a party who testifies by deposition testifies when he is sworn and deposes, and not when the deposition is read. All that is necessary then is for a party to give his deposition before his other witnesses testify in chief, either orally or by deposition. As appellee's deposition was the only one used by her, and as it was taken long before her other witnesses testified for her in chief, it was entirely proper, under the circumstances, to permit it to be read to the jury.

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2. Appellant contends that instruction No. 1 assumes that appellant "negligently permitted" its wire to hang over the road and obstruct public travel. This instruction is as follows: "The court instructs you to find for the defendant, unless you shall believe from the evidence that while plaintiff was driving along the public road at the time and place mentioned, and while she was exercising ordinary care for her own safety, if she was so, she, the plaintiff, came in contact with a line of wire belonging to or under the control of the defendant, and which defendant or its agent in charge of said line had negligently permitted, if it had done so, to hang over and near the roadbed, and obstruct the travel thereon at said time, and if you shall also believe from the evidence that the defendant or its agent in charge thereof knew, or by the exercise of ordinary care could have known, of its said condition in time to have repaired or removed the same and prevented the alleged injury, if any, but failed to do so, if it did so fail, and if under these circumstances and by reason thereof the plaintiff was thrown to the ground and injured by such contact with the said wire, then, in that event, you will find for plaintiff, and award her such amount in damages as will fairly and reasonably compensate her on account of her mental and physical suffering endured by her, if any, by reason thereof, also a reasonable compensation for the time she has lost from her business, if any, by reason thereof, together with a reasonable compensation for any permanent reduction in her power to earn money, if any, by reason thereof, not exceeding upon the whole the sum of $15,000, the amount claimed in the petition." Counsel for appellant, after stating that the language is, "If the jury shall believe from the evidence that

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* * * the plaintiff came in contact wtih a line of wire * * * which defendant had negligently permitted—if it had done so—to hang over the roadbed and obstruct travel," etc., argue that the only question submitted to the jury was whether the plaintiff came in contact with the wire, and that the question of negligence upon the part of the defendant was assumed, or at least the average juror would so construe the instruction, notwithstanding the parenthetical words, "if it had done so." It will be observed, however, that counsel are mistaken both as to the language used and as to its effect. The proposition in regard to negligence is coupled with the preceding propositions by the copulative conjunction "and," and in such manner as to make it necessary for the jury, in order to find for appellee, to believe, not only the preceding propositions, but this particular proposition itself. The meaning of the language is just the same as if the court had said: "And that the defendant or its agents in charge of said line had negligently permitted said wire, if it had done so, to hang over and near the roadbed," etc. Besides, the language used contained the qualifying clause, "if it had done so," and the effect of this was to exclude from the minds of the jury the idea that negligence was assumed.

3. Counsel for appellant insist that because there was no averment in the petition of any permanent reduction in appellee's power to earn money, and no proof that she was a money earner, it was error to allow compensation on that account. The petition, after alleging that "plaintiff was thrown with great force from said buggy, and hurled with much violence against the said roadway, rendering her unconscious, severely injuring her head and neck, wrenching and

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spraining her spine and the tendons and ligaments thereof, bruising, spraining and laming her right leg and right arm, cutting and bruising painfully her face, and causing her great internal injury, and physical and nervous shock," further alleges that "she is permanently disabled and crippled, and her health permanently impaired, as a result of her said injuries." It is insisted by counsel for appellant that the above allegations are not sufficient to authorize a recovery for permanent reduction in power to earn money, but that the petition itself should have specifically alleged a permanent reduction in power to earn money. In support of this position, counsel cite a large number of authorities to the effect that special damages should be specifically pleaded. This proposition is undoubtedly true, for this court has held in a number of instances that a plaintiff cannot recover for special damages such as loss of time, physicians' bills, bills for medicines and nursing, etc., unless such items are specially pleaded. (South Covington, etc., v. Ware, 84 Ky. 267, 8 Ky. Law Rep. 241, 1 S. W. 293; L. & N. R. R. v. Mason, 72 S. W. 27, 24 Ky. Law Rep. 1623; Jesse v. Shuck, 12 S. W. 304, 11 Ky. Law Rep. 463; L. & N. R. R. Co. v. Reynolds, 71 S. W. 516, 24 Ky. Law Rep. 1402; Baries v. Louisville Electric Light Co., 118 Ky. 830, 25 Ky. Law Rep. 2303, 80 S. W. 814, 85 S. W. 1186; C. & N. Ry. Company v. Hanmer, 66 S. W. 375, 23 Ky. Law Rep. 1846; Illinois Central R. R. Co. v. Hanberry, 66 S. W. 417, 23 Ky. Law Rep. 1867; L. & N. R. R. Co. v. Farris, 100 S. W. 870, 30 Ky. Law Rep. 1193.) This whole question depends upon whether a permanent reduction in power to earn money is an item of special damage, or may be recovered for under a claim of general damages. General damages are such as

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the law presumes to have accrued from the wrong complained of, and need not be averred. Alexander v. Humber, 8 Ky. Law Rep. 619; Brown v. Railway Co., 99 Mo. 310, 12 S. W. 655. In Maxwell on Code Pleading, p. 79, the rule is thus stated: "Damages which necessarily and generally result from the wrongful act which is the subject of the action may be recovered under a general claim for damages." In Bradbury v. Benton, 69 Me. 199, the court said: "In legal contemplation all damages which will be sustained as the effect of the injury are sustained immediately. The future effect of the injury is not special damage, which must be alleged, but general damages which necessarily flow from the injuries received." In Watson on Personal Injuries, p. 383, we find the following: "It has been held that it is not necessary to claim damages for the future effects of injuries sustained, as such consequences are general, as distinguished from special, damages." And on page 639 the same authority says: "There need be no special averment of diminution of earning capacity, where the injuries described are of a nature usually and ordinarily to produce such results." We are therefore of the opinion that permanent reduction in power to earn money is a necessary incident of permanent disability. All that it is necessary to allege is permanent injury or such facts as show that the injury is permanent. Maysville & Big Sandy R. R. Co., etc., v. Willis, etc., 31 Ky. Law Rep. 1249, 104 S. W. 1016. Permanent reduction in power to earn money is merely the test to be applied by the jury in determining the compensation to be awarded for the permanent injury. As appellee alleged permanent disability, it was proper for the court, so far as the pleadings were concerned, to instruct the jury to

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award her damages for any personal reduction in her power to earn money.

But counsel for appellant further insists that appellee was not entitled to recover compensation for any permanent reduction in her power to earn money, as there was no evidence of her earning capacity. In Fisher v. Jansen, 128 Ill. 549, 21 N. E. 598, the rule is thus stated: "A party personally injured from negligence may recover of the defendant damages for his inability to labor or transact business in the future, without any evidence of his success in business prior to his injury, or the extent of his earnings. Direct proof of any specific pecuniary loss is not indispensable to a recovery." In Macon v. Paducah St. Ry. Company, 110 Ky. 680, 23 Ky. Law Rep. 46, 62 S. W. 496, this court said: "The court also allowed for loss of capacity to perform the kind of labor for which he was fitted. This was error. It is not for the court or jury to undertake to determine the kind of labor for which he was or might become fitted." In South Covington & Cincinnati Ry. Co. v. Bolt, 59 S. W. 26, 22 Ky. Law Rep. 906, this court laid down the following rule: "Under the laws of this State she was entitled to earn wages, and, if she was deprived of her ability to do so by the negligence of the appellant, she is entitled to recover a fair equivalent in money. * * * Our opinion is that, if a married woman is injured by the negligent act of another, she is entitled to maintain an action for damages, and the same criterion of damages exists as to her as to a man or a single woman." Furthermore, in the case of a permanent injury to an infant, his recovery for permanent reduction in power to earn money, in a suit by his next friend, is limited to the time after he arrives at his majority. It is manifest, therefore,

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that it would be impossible to furnish any direct evidence of his earning capacity at that time. If, then, such evidence were a prerequisite to a recovery, there could be no recovery, for any statement as to the future earning capacity of an infant would be mere speculation, and not evidence. Of course, evidence of earning capacity is always proper, but we do not think the failure to offer such evidence is fatal to a recovery. Appellee showed that prior to the accident she was in good health, and had done the cooking, washing, ironing, and general housework for a large family. After that time she was unable to perform any of those duties. It would have been difficult either to allege or prove the value of such services in dollars and cents. She had the right, however, to earn money. Her power to do so was impaired. To what extent was a question for the jury, to be determined by the application of their common knowledge and experience to all the facts and circumstances of the case.

4. Counsel for appellant complain that the error in instructing the jury to find "also a reasonable compensation for the time she has lost from her business, if any, by reason thereof," was not cured by erasing those words from the instruction, after the conclusion of the argument on both sides, and just as the jury was retiring to consider their verdict. It does not appear in the record that counsel for appellant asked permission to re-argue the case. Furthermore, the change made in the instruction was in favor of appellant. The court not only erased the objectionable words, but admonished the jury to disregard them. The effect of this action was to impress upon the minds of the jury that, in no event, were they to award damages for loss of time. Indeed, that fact

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was made even more apparent than if the instruction had been altogether silent upon the subject. We therefore fail to see how appellant was in any way prejudiced by the action of the court.

5. Appellant contends that the verdict for $7,500 is flagrantly excessive. To determine this question, it will be necessary briefly to review the evidence. The testimony for appellee, including her own and that of her daughter, her neighbors, and two reputable physicians, is to the effect that prior to the accident she was a fairly strong woman; that she had eight children, and did the washing, ironing, and scrubbing and general housework for the entire family; that after the accident she got up for a few times, but finally went to bed, and had been confined to her bed or room ever since; that she had suffered a great deal from her back and head; that she did not see well out of one eye, and had a roaring all the time in one ear; that the accident produced a concussion of the brain and spinal cord, and a functional derangement of the bladder; that she was partially paralyzed in the right arm and leg; that at the time of the trial, more than a year after the accident, she was in a helpless condition, and growing worse all the time; that she was unable to keep anything on her stomach, and had frequent rigors and sinking spells; that her family had frequently to take her up and bathe her limbs in order to ease her pain; that before the accident she weighed about 120 pounds, while at the time of the trial she weighed about 85 or 90 pounds. One of the physicians also testified that her injuries were permanent, but upon objection by appellant this evidence was excluded by the court. This ruling of the court was not proper; for, under such circumstances,

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it is always proper to prove the permanency of injuries by the opinions of physicians.

One of the physicians who testified for appellant stated that he called to see appellee on September 1, 1906; that he examined her, and found her right side and arm sore and tender; that appellee said she was paralyzed, but she was not; that she could put her hand to her head, and could walk across the floor with difficulty; that it was exceedingly painful, and that she could not bear weight on her right leg; that in his opinion she was suffering from neurasthenia, and kind of nerve tire and exhaustion, and that she also had symptoms of hysteria; that he did not believe her condition was due to the injury received; that he did not know what it was due to; that it might be due to massage or a number of causes; that without any knowledge of her accident he would say that she was a neurotic, and that she was suffering from hysteria alone; that he found no evidence of concussion of the brain or spinal cord. The other physician who testified for appellant said that he called to see appellee on January 26, 1907; that she seemed thin, emaciated, and her general health not good; that this condition was due to the nervous strain through which she had been going, and was not due to the accident; that she seemed anæmic and of a weak, nervous make up; that he ascribed her condition to hysteria, confinement in the house, and lack of exercise; that hysteria was a very difficult disease to treat and overcome; that it might have been due to the accident; that in his opinion appellee was able to come to court. It is manifest from the verdict in this case that the jury adopted the views of appellee's witnesses both as to the character of her injuries and the cause thereof. And we confess that this con-

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clusion appears altogether reasonable in view of the fact that prior to the accident appellee's health was good, and there was no evidence even of that neurotic condition discovered by appellant's physicians after the accident, and for which they do not satisfatcorily account on any other ground. According to the testimony of her witnesses, appellee was severely injured and suffered intense physical and mental pain. By reason of her injuries, she was partially paralyzed and became a mental and physical wreck. At the time of the trial, which occurred more than a year after the accident, she was practically in a helpless condition, and was growing weaker all the time. Without regard to the statement of her physician, which should have been permitted to go to the jury, we are of the opinion that there was sufficient evidence to lead to the conclusion that her injuries were permanent. When the character of her injuries is considered in connection with the suffering she must have experienced, both physically and mentally, we are unable to say that a verdict of $7,500 is so excessive as to justify us in reversing this case.

Judgment affirmed.

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CASE 57.—PERSONAL INJURY ACTION BY ADDIE HAMMOCK AGAINST THE UNIVERSITY OF LOUISVILLE.—December 17.

University of Louisville v. Hammock

Appeal from Jefferson Circuit Court; Common Pleas Branch; Third Division.

MATT O'DOHERTY, Judge.

Judgment for plaintiff, defendant appeals—Affirmed.

1. Abatement—Misnomer of Defendant—Necessity to Pleading in Abatement.—A corporation, when sued under a wrong name, must by answer or plea in abatement set forth the misnomer and disclose its true name, so that plaintiff may amend, and it can not object to the misnomer for the first time on appeal.
2. Appeal—Question not Raised in Trial Court—Misnomer of Defendant.—Where, in an action against a corporation sued under a wrong name, it appeared that it owned and controlled the hospital in which plaintiff sustained the injuries complained of, and it failed to object in the court below to the name given it or to disclose its true name, but made a defense on the merits, it could not complain on appeal that judgment went against it in the name by which it was sued.
3. Hospital—Injuries to Patients—Negligence—Evidence.—In an action by a patient in a hospital assaulted by a demented patient therein, evidence held to show negligence on the part of the employes of the hospital in permitting the demented patient to escape from his room and assault the patient, authorizing a recovery.
4. Damages—Personal Injuries—Excessive Damages.—A patient in a hospital was assaulted by a demented patient, and injured. Her illness was immediately and greatly aggravated in consequence of the assault, and her health was, to some

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extent, permanently impaired thereby. Held, That a verdict of $1,000 was not excessive.

5. Charities—Hospitals—Injuries to Patient—Liability.—Where a hospital is maintained as a charitable institution, either by the government, or by a corporation, or by an individual, there is no liability for injuries to a patient therein in consequence of torts of the employes in charge thereof.

6. Hospitals—Injuries to Patient—Liability.—A hospital maintained by a university as an adjunct to its school of medicine for the advantage of its students and professors, and conducted for profit by requiring compensation from patients able to pay, though receiving free of charge patients unable to pay, is not a charitable institution, and the corporation is liable to a pay patient for the torts of its agents and employes.

BURNETT & BURNETT for appellants.

POINTS AND AUTHORITIES.

Hospitals.—A private, or quasi private charity is not liable for the negligence of its employes, or for its own negligence in selecting employes. (Adams v. University Hospital, Central Journal No. 64, p. 214; Parks v. University, 218 Ill., 381; Fire Ins. Patrol v. Boyd, 120 Pa., 624; Williamson v. Louisville School of Reform, 95 Ky., 251; Perry v. House of Refuge, 63 Md., 20; Marie v. Eastern Hospital, 97 Va., 507; Downes v. Harper Hospital, 101 Mich., 555; McDonald v. Hospital, 120 Mass., 432; Benton v. Trustees, 140 Mass., 13.)

Negligence will not be presumed, but must be proven.

Corporation must be sued in its corporate name. (Act approved February 7th, 1846.)

BENNETT H. YOUNG for appellee.

(No brief for appellee.)

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellee, Addie Hammock, recovered a verdict and judgment for $1,000 damages in the court below against the appellant, University of Louisville, for

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injuries to her person alleged to have been received while a patient in its infirmary at the hands of a demented or partially demented patient of the same institution, who, it was charged, had negligently been permitted to escape from his room and keeper, wander into that of appellee, and assault her and maltreat her.

Failing to obtain in the lower court a new trial, appellant asks of this court a reversal of the judgment in question upon three grounds: (1) That it was not sued in its true corporate name; (2) that no negligence was shown, and that the verdict returned by the jury was contrary to law and flagrantly against the evidence; (3) that appellant is a charitable institution and by reason thereof exempt from liability for the torts of its agents or servants.

As to the first proposition, little need be said. Obviously appellant was sued and judgment recovered against it as the "University of Louisville," when its true corporate name was and is the "President and Trustees of the University of Louisville," but the misnomer cannot be objected to for the first time on appeal. It should have been made in the circuit court by answer or affidavit in the nature of a plea in abatement, setting forth the misnomer and disclosing the true name of the defendant. When this is done, the plaintiff may amend his petition, and then proceed against the defendant in his true name. L. & N. R. R. Co. v. Hall, 12 Bush, 131; Teets v. Snider Heading Mfg. Co., 120 Ky. 653, 87 S. W. 803, 27 Ky. Law Rep. 1061; Pike, Morgan & Co. v. Wathen, 78 S. W. 137, 25 Ky. Law Rep. 1264; 14 Ency. of Plead. & Prac. 295. The record shows that the corporation sued was the same corporation that owned and controlled the hospital in which appellee sus-

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tained her injuries; and, as it failed to object in the circuit court to the improper corporate name given it or to disclose its true corporate name and there made defense on the merits, it is estopped to complain that judgment went against it in the name by which it was sued.

In our opinion the second contention of appellant is equally without merit. There was testimony conducing to prove negligence on the part of appellant and its employes in charge of the hospital, and that such negligence was the proximate cause of appellee's injuries. The facts, as disclosed by the evidence, were, in substance, that appellee, a married woman, who was laboring under a serious illness, and greatly prostrated thereby, had placed herself in the hospital at the instance of her physician. She was a pay patient, and had the right to expect of appellant and its employes in charge of the institution careful and skillful nursing and treatment such as her case particularly required. Indeed, the sick leave their homes and enter hospitals because of the superior treatment there promised them. On the day after appellee entered the hospital, its manager received as an inmate thereof a patient known as Dr. Meador, who was at the time afflicted with delirium tremens, a disease resulting from the excessive, habitual use of intoxicating liquors. This patient was placed in a room of the hospital on the floor beneath that occupied by appellee. At 10 p. m. of the same day Meador became so uncontrollable that he overawed the single female nurse in whose charge he had been left, and, escaping from his room, passed through the hall of the building and upstairs, talking in a loud voice and using profane language. Upon reaching the upper floor, he entered the room

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occupied by appellee, and approaching the bed where she was lying, seized her by the arms, struck and bruised her person, and dragged her from the bed, to her great fright and injury. Meador was finally captured, removed from the room, and securely tied by two nurses with the assistance of a negro porter, and a little later was returned to and confined in his own room. Whatever may have been his condition at other times, Meador, according to the evidence, was manifestly violent, uncontrollable, and delirious, if not actually crazy, when he escaped from his room and entered that of appellee and assaulted her. He was a large man of more than 200 pounds weight and great physical strength. Howard, the negro porter, admitted that he was physically unable to cope with him without assistance. The fact that physicians had disagnosed Meador's case as delirium tremens before he entered the hospital, and that such was his disease when received there, was known to one of the physicians in charge of the hospital, to its head nurse, Miss Parsons, and two other nurses of the institution, one of whom was Miss Zeigler, from whose custody he escaped just before appellee was assaulted by him. One of the nurses admitted that she was directed by Meador's physician not to make an entry on the hospital chart of his true malady, and this direction she obeyed, thereby concealing the fact that the patient was afflicted with delirium tremens. Whether Meador manifested a disposition to become violent between the time of his admission to the hospital and the time of his breaking away from the nurse does not definitely appear from the evidence, but his disease being known, as it was, to a physician of the institution, its head nurse, and two of her assistants, when Meador was received,

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and their further knowledge, especially that of the physician, that a person so afflicted might reasonably be expected to become violent, uncontrollable, and dangerous at any time, ought to have induced them to take such reasonable precautions with reference to his control or confinement as would have prevented his inflicting injury upon other inmates of the hospital. Yet this powerful man, crazed from the excessive use of spirituous liquors, and by reason of that fact uncontrollable and dangerous, was left in an insecure apartment and in charge of a single woman, who was utterly powerless to restrain him. Under these circumstances, it would seem to a reasonable mind that what happened was to have been expected, if not inevitable. There was therefore some evidence of negligence to go to the jury, and, in the light of that evidence, we do not feel called upon to declare that the verdict finding appellant guilty of negligence was unauthorized. It cannot be denied that the attack made by Meador upon appellee was disastrous to her. If we accept her version of the matter, and it is not materially contradicted, the only wonder is that, in her physically weak and nervous condition, she was not frightened to death by the cries and violence of the madman. Much of the testimony went to show, not only that her illness was immediately and greatly aggravated, but that her health was, to some extent at least, permanently impaired thereby. In view of these facts, the amount recovered cannot be regarded excessive.

Appellant's third contention, that it is a charitable institution and by reason thereof exempt from liability for the negligence of its servants, is in conflict with more than one decision of this court. The hospital in which appellee received the injuries com-

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plained of is an adjunct of the appellant's school of medicine, known as the "University of Louisville," and is maintained principally because of the advantages it affords to the students and professors of that institution. It is, however, also conducted for compensation and profit. In the main, patients received and treated at the hospital are required to compensate those in charge of it for the services rendered. This is certainly true, according to the evidence, as to patients able to pay. It is true some patients unable to pay are received and treated free of charge, but this does not show that appellant conducted a purely public charity; and, to escape liability for the wrongful acts or negligence of its servants, it should have proved that such was the character of the hospital and the use to which it is devoted. The hospital is not maintained by taxation, or controlled by the State, or city of Louisville. Eleemosynary institutions and other institutions of like character devoted to purely charitable uses, whether maintained by government, corporations, or individuals, are exempt from such liability as was here imposed upon appellant, on the ground that they are mere instrumentalities brought into being to aid in the performance of governmental or public duty; but such is not the character of the hospital maintained by appellant. Hence its attempt to escape liability for the negligence of its agents resulting in appellee's injuries was properly prevented by the trial court. The question under consideration was decided adversely to the contention here urged by appellant, in the case of Gray Street Infirmary v. City of Louisville, 65 S. W. 1, 23 Ky. Law Rep. 1274, 55 L. R. A. 270. In that case the Gray Street Infirmary sought to escape taxation for municipal purposes on the ground that it was an

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institution of public charity, and therefore not subject to taxation. But, in rejecting that contention, this court said: "Dr. Grant testifies that the institution would not have been established, except that the incorporators hoped to receive pecuniary advantage from it, either directly or through their connection with the college. We have no doubt from the testimony that the professors in the medical college do a great deal of charitable work in the infirmary, yet the real purpose in establishing the infirmary was to make their college more attractive to students, and to induce attendance by reason of the instruction and clinical experience received in the infirmary. And in this way to increase the profits of the professors operating the college. Certainly such an institution cannot be exempted from taxation on the ground that it is purely an institution of public charity." The same view of the law is expressed in the later case of Wathen v. City of Louisville, 85 S. W. 1195, 27 Ky. Law Rep. 635, in the opinion of which it is said: "It is manifest from the evidence that the hospital is maintained because it is necessary to the successful conduct of the school of medicine. Without the clinical instruction and the operations by the professors in the presence of the students, the school could not be maintained with success. The hospital is an adjunct or a part of the medical school. Whatever gain may result from the operation of the medical school goes to the owners of the property. While the evidence shows that a great deal of charity work is performed in the treatment of patients and in dispensing medicines, still the institution is conducted for profit. As it is operated for gain, no part of it is exempt from taxation under section 170 of the Constitution. This conclusion is supported by Gray

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Street Infirmary v. City of Louisville, 65 S. W. 1, 23 Ky. Law Rep. 1274, 55 L. R. A. 270." We think these two cases control the case at bar, and hence we adhere to the doctrine therein expressed. If, as must be conceded, appellant's hospital is subject to taxation because it is not a charitable institution, it is for the same reason responsible for the torts of its agents and employes. No criticism is made of the instructions, and they were clearly correct, unless the appellant had shown itself entitled to a peremptory instruction, on the ground of the exemption from liability claimed, which we have said it could not do.

Finding no error in the rulings of the lower court, the judgment is affirmed.

CASE 58.—CONTROVERSY BETWEEN T. HARLAN & CO. AND BENNETT, ROBBINS & THOMAS. INVOLVING A LIEN FOR ATTORNEY'S FEES.—December 17.

Harlan & Co. v. Bennett, Robbins & Thomas

Appeal from Hickman Circuit Court.

R. J. Bugg, Circuit Judge.

From the judgment Harlan & Co. appeals—Affirmed.

1. Attorney and Client—Attorney's Lien for Services—Time When Lien Attaches—Priorities.—A lien for attorney's services decreed by the judgment in the action wherein the services are rendered relates back and takes effect from the time of the commencement of the services, and is superior to an attachment subsequently levied on the interest of the

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attorney's client in the property involved in the action.

2. Same—Right to Lien—Statutory Provisions.—Ky. Stats., 1903, section 107, provides that, where an action is prosecuted to a recovery, the attorney shall have a lien on the judgment for money or property which may be recovered for his fee, etc. Under Civil Code Prac., section 732, subsection 34, the word "action" embraces a demand for a set-off or counterclaim. Held, That, while, where defendant's attorney merely defeats a recovery by plaintiff, he is not entitled to a lien on the property involved in litigation, he is entitled to a lien if he obtains an affirmative judgment for defendant.

3 Partnership—Lien of Partner on Assets.—A partner has a lien on the partnership assets for his portion thereof after payment of the firm debts.

4. Attorney and Client—Attorney's Lien for Services—Statutory Provisions.—Ky. Stats., 1903, section 107,, provides that where an action is prosecuted to a recovery, the attorney shall have a lien on the judgment for money or property recovered for his fee. Held, That where, in a suit by partners to settle the partnership and to enforce their lien on the assets, defendant partner obtained an affirmative judgment for a definite sum then under the control of the court, the title to which up to the time of the judgment was in the partnership and not in himself alone, there was a recovery within the meaning of the statute, and defendant's attorney was entitled to a lien for his fee.

J. M. PRIMMAL and DuBASON, RANKIN & ELDER, Attorneys for appellant.

BENNETT, ROBBINS & THOMAS for appellee.

OPINION OF THE COURT BY WM. ROGERS CLAY, Commissioner—Affirming.

On May 15, 1904, W. F. Cowles, Geo. S. Cowles, and L. W. Cowles instituted an action in equity against Geo. S. Palmer in the Hickman circuit court, seeking a settlement of the copartnership existing between them, which was conducted under the first name of the Diamond Cooperage Company. Appellees, Bennett, Robbins & Thomas, were employed by

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the defendant Palmer as his attorneys to defend for him and assert his claim to the partnership assets. On June 13, 1904, they prepared and filed his answer and counterclaim. In the pleadings, which were voluminous, plaintiffs sought to charge Palmer with large sums of money, while he made counter charges against them, and prayed for a settlement of the partnership, and for judgment for such sum as might be found to be due him. A great deal of testimony was taken, and every point involved in the case warmly contested. On October 13, 1905, judgment was rendered fixing the rights of the parties, including the creditors of the firm, and in that judgment a lien for $300 was decreed in favor of appellees on the money adjudged to Palmer out of the assets of the firm. Pending this litigation, the property of the firm had been sold, and the proceeds were in the custody of the court. On November 18, 1904, appellants sued Geo. S. Palmer for about $2,000, and had an attachment issued against his property. On the following day this attachment was levied on Palmer's interest in the firm property. Subsequently John R. Kemp, the special commissioner of the court, who under proper orders sold the firm property, was summoned as garnishee. On September 27, 1905, appellants recovered judgment against Palmer for $1,360.98, and their attachment was sustained. By judgment entered October 11, 1906, the sum adjudged to Geo. S. Palmer out of the partnership assets was fixed at $1,313.21. Appellants were given all of this fund, except $339.87, which was held until the issue could be tried between them and appellees. On October 10, 1906, appellants filed an amended petition, making appellees parties to the proceedings. Appellees thereupon filed a demurrer and answer.

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The case was submitted, and judgment rendered February 14, 1907, adjudging appellees' lien for attorney's fee superior to appellants' attachment lien. The validity of this judgment is now before us.

As appellees filed Palmer's answer and counterclaim several months prior to the time of appellants' attachment, appellees' lien, if they had any, related back and took effect from the time of the commencement of their services, and was superior to the attachment. Robertson & Cleany v. Shutt, 9 Bush, 659. The only question to be determined then is whether or not appellees were entitled to a lien. Section 107, Ky. St. 1903, provides: "Attorneys-at-law shall have a lien upon all claims or demands, including all claims for unliquidated damages put into their hands for suit or collection, or upon which suit has been instituted, for the amount of any fee which may have been agreed upon by the parties, or in the absence of such agreement for a reasonable fee for the services of such attorneys; and if the action is prosecuted to a recovery, shall have a lien upon the judgment for money or property which may be recovered—legal costs excepted—for such fee," etc. It will be observed that the statute gives the attorney a lien where the action is prosecuted to a recovery. Under subsection 34, section 732, Civ. Code Prac., the word "action" embraces a demand for a set-off or counterclaim. Therefore the attorney for the plaintiff may not be the only attorney entitled to a lien. There may be instances where the attorney for the defendant has the same right. Of course, if the attorney for the defendant merely succeeds in defeating a recovery by the plaintiff, he is not entitled to a lien upon the property involved in the litigation. Lytle v. Bach & Miller, 93 S. W. 608, 29 Ky. Law Rep. 424; Wilson

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v. House, 10 Bush, 406. If, however, he succeeds in obtaining an affirmative judgment in favor of his client, we think the rule is otherwise.

In the case of Damron v. Robertson, etc., 80 Tenn. 372, the Supreme Court of Tennessee, where the rule is the same as in this State, that the attorney has no lien except in cases of a recovery, confirms this view. In that case a suit was instituted for the sale and distribution of the property of a decedent, and for the purpose of requiring an accounting of advancements received by the heirs. One of the heirs was a defendant in the action, and was represented by attorneys. The latter succeeded in defeating any charge against their client for advancements, and out of the proceeds of the property of the decedent, the fund being in court, their client was adjudged about $1,000. The decedent held the defendant's notes for sums more than his distributable share of the estate, and the administrator instituted an action and attached the defendant's share of the fund in court. In the meantime the attorneys who represented the defendant in the suit for division and settlement intervened in the attachment case, and claimed a priority of lien for their services for the defendant. The lower court sustained the attachment lien, and gave the plaintiff in the attachment the fund as against the attorneys. Upon appeal, the Supreme Court, in reversing the case, said: "The fund in controversy was in custodia legis in the original cause, being money derived from the sale of property for division, and for which there was a decree in that cause in favor of W. R. Robertson. The services were rendered by Lamb & Tillman for him in that cause. Those services gave them a lien without any order of court on the fund, which became fixed by the posi-

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tive decree in favor of their client in that cause. Cunningham v. McGrady, 2 Baxt. (Tenn.) 141. Their services were not merely in defense of their client's title against adverse claim, but resulted in the recovery of a decree in his favor for a definite sum then in the control of the court, although nominally a defendant. In equity the position of a party is of no consequence. Their lien was, of course, superior to the lien of the complainant as a subsequent attaching creditor. Carrigan v. Leatherwood, 3 Leg. Rep. 137, s. c. 3 Tenn. Cas. 38. The order of this court would not prejudice the lien." Every partner has a lien on the partnership assets for his portion thereof after the payment of the firm debts. The action by the Messrs. Cowles against the defendant Palmer, in which appellees were adjudged a lien for their legal services in behalf of Palmer, was not a suit to recover an indebtedness already ascertained by a partnership settlement. It was a suit to settle the partnership, and to enforce their lien upon the assets. The defendant Palmer not only controverted their claim, but affirmatively asserted his own claim to and lien upon the assets. These assets were not in the possession of any of the partners. They were in custodia legis. By the efforts of appellees, therefore, the defendant Palmer did not succeed merely in defeating the claim of plaintiffs, or in retaining that which was already his and under his control, but in establishing his positive right to and obtaining an affirmative judgment for a definite sum then under the control of the court, the title to which up to the time of the judgment was in the partnership, and not in himself alone. To this extent we think there was a recovery within the meaning of the statute, and that the court properly allowed appellees a lien for their fee of

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$300 which was certainly reasonable in view of the character and result of their labors.

For the reasons given, judgment is affirmed.

Petition for rehearing by appellants overruled.

CASE 59.—ACTION BY J. T. EARLE, MAYOR OF LATONIA, AGAINST THE LATONIA AGRICULTURAL ASSOCIATION TO TEST THE VALIDITY OF A LIQUOR ORDINANCE.—December 17.

Earle, Mayor, v. Latonia Agr. Association

Appeal from Kenton Circuit Court.

W. McD. SHAW, Circuit Judge.

Judgment for defendant, plaintiffs appeal.—Af-

Intoxicating Liquors—Municipal Regulation—Delegation of Power—Locality of Offense.—Constitution section 143 authorizes the establishment of a police court in each city and town in the State, with jurisdiction over violations of municipal ordinances and by-laws within the corporate limits of the city or town in which it is established. Ky. Stats., 1903, section 3490, subsection 27, authorizes the council of a city of the fourth class to pass ordinances licensing, permitting, and regulating or restraining the sale of intoxicating liquors within the limits of a city, or restraining or prohibiting the sale thereof within one mile of the limits of such city. Held, That an ordinance of a municipal corporation prohibiting the sale of intoxicating liquors within a half mile of the corporate limits, and further providing that any person violating the provisions of the ordinance should, on conviction in the police court in the city, be fined, etc., and making it the duty of the police to enforce the ordinance, and to arrest all persons violating the same, and to take them before the police judge of such city to be dealt with according to the

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ordinance, was void, as in conflict with the constitutional provision.

ORLANDO P. SCHMIDT for appellant.

It will not do for appellee to contend that it was duly licensed by the State and Federal government to sell liquor, and that said chief of police did, on May 31, 1906, arrest four of its "employes" engaged in and about its cafe and bar in selling liquors; first, because it has no authority to engage in such traffic, and, second, because this could not be plead in justification of the offense committed by these four men.

The ordinance is not void simply because the city council did not deem it necessary for the peace and good order of the local community (which has grown to, and stretches around, the north and east sides of the race course), to prohibit the traffic throughout the entire belt over which its discretionary (not mandatory) power extended.

It might be contended with equal force that local option laws are void because they do not prohibit over the entire State.

The Legislature can license in one locality and prohibit in another, and, having this power, could delegate it to cities of the fourth class.

The Constitution does not attempt to fix the territorial limits of cities, but leaves this altogether to the Legislature. It permits the Legislature to confer exclusive jurisdiction on police courts to hear and determine all infractions of ordinances. The police had authority to arrest Brizzolari, etc., under the warrant within two miles of the city limits, so that, when these men were brought before the police judge, they were within the city limits, in the narrowest sense of the term, and the jurisdiction of the police court was complete.

It is therefore respectfully submitted that the rulingson the special demurrer and motions to elect and the final judgment appealed from are erroneous, and should be reversed.

AUTHORITIES CITED.

Ky. Stats., sections 3490, subsection 27, 3513, 3596, 3164; Civil Code, sections 18, 83, 379; Constitution, sections 156, 143; Board of Trade of Falmouth v. Watson, 5 Bush, 660; Banklick T. P. Co. v. Phelps, 81 Ky., 616; Goldsmith v. Owen, 95 Ky., 420; Schwearman v. Comth., 99 Ky., 298; Koch v. Comth., 27 Ky. Law Rep., 122; Ingram v. Fuson, 26 Ky. Law Rep., 863; Lehman v. Beeler,

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24 Ky. Law Rep., 174; Dillon on Municipal Corps., section 338 (2d Ed.).

HARVEY MYERS for appellee.

QUESTIONS DISCUSSED.

1. Is the twenty-seventh subsection of section 3490, Ky. Stats., relating to fourth class cities, authorizing the council to license the sale of liquors within the city limits, and to prohibit such sales within one mile outside of the corporate limits, constitutional?

2. Can the city council of a fourth class city, which licenses and permits the sale of liquors within its corporate limits, legally enact an ordinance prohibiting the sale of liquors within a half mile outside of its corporate limits?

3. Can fourth class cities confer by such an ordinance jurisdiction upon the police court of such cities to try persons arrested for violating an ordinance prohibiting the sale of liquors outside the corporate limits?

Three separate and distinct grounds are urged on behalf of appellee, as follows:

First—The statute is void for two reasons.

(a) It is discriminatory on its face.

(b) It is contrary to the Constitution.

Second—If the statute is constitutional, the ordinance enacted under it is void because it does not comply with its terms.

Third—The ordinance is unconstitutional because it attempts to confer jurisdiction upon the police court of the city to try cases originating without the limits of the corporation.

AUTHORITIES CITED.

Ky. Stats., section 3490, subsection 27; Horr & Bemis Munic. Police Ord., sections 135, 136, 137; St. Louis v. Smith, 2 Mo., 113; State v. Fay, 44 N. Y., 477; Staffey v. Monroe, 135 Ind., 169; 41 Fla., 443; 58 Vt., 207; Daniel v. Richmond, 78 Ky., 542; Fechheimer v. Louisville, 84 Ky., 206; Constitution, section 143; Ingram v. Fusom, 26 Ky. Law Rep., 863; Shinkle v. City of Covington, 7 Ky. Law Rep., 412.

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OPINION OF THE COURT BY JUDGE NUNN—Affirming.

It appears that appellee is the owner of about 100 acres of land near the city of Latonia, a fourth-class city, but not within its corporate limits; that it has constructed a race course and erected valuable buildings thereon, consisting of a clubhouse, paddocks, stables, etc., at a cost of many thousands of dollars; and that, in connection with its races and exhibitions, it is required to and does accommodate large concourses of people, who gather there to witness trials and tests of speed horses and to see other exhibitions held by it upon the grounds; that for the accommodation of those there assembled it sells refreshments and liquors under a license granted it by the State of Kentucky and by the federal government. On March 6, 1906, the city council of Latonia enacted an ordinance, the three material sections of which read as follows:

"Section 1. That it shall be unlawful for any person, firm or corporation to sell vinous, spirituous or malt liquors or any kind of such liquors, within one-half mile of the corporate limits of the city of Latonia, Kentucky, provided, however, that this section shall not apply to any territory embraced within the corporate limits of the town of Central Covington, or any territory in Campbell county, Kentucky.

"Section 2. That any person, firm or corporation who shall be guilty of violating any provision of section 1 of this ordinance, shall, upon conviction in the police court of said city, be fined in any sum not less than twenty dollars nor more than one hundred dollars, and the cost of prosecution, in the discretion of the court.

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"Section 3. That it is made the duty of the chief of police and several policemen, of said city, to see that this ordinance is strictly enforced, and to immediately apprehend any and all persons who may be found violating the provisions of section 1 hereof and take them before the police judge of said city to be dealt with according to this ordinance."

Appellee further alleged that at the time the above ordinance was enacted the city of Latonia did license and permit the sale of such liquors within the corporate limits of the city, and that its grounds and many of its buildings are situated within one-half mile of the corporate limits of the city of Latonia; that appellant, on May 31, 1906, had arrested four employes of appellee engaged in selling liquors for appellee to those congregated upon its grounds, and had taken them before appellant Z. T. Carlton, police judge of the city of Latonia; that he had set their cases for trial on June 2, 1906; and that he would try the cases and enforce the ordinance. It was also alleged that the ordinance is contrary to the Constitution and laws of the State of Kentucky and is void, and that Z. T. Carlton, police judge of the city of Latonia, has not the authority or right to hear, try, or determine the cases or the case of any person arrested for violating the ordinance outside of the corporate limits of the city of Latonia, and charged that, unless appellants were enjoined and restrained from further proceeding under the alleged ordinance to arrest and punish the employes of appellee, they will proceed thereto daily, or with more frequent arrests, trials, and convictions, to the great and irreparable injury and damage to appellee, which would not be susceptible of approximate ascertainment in money. It asked for a writ of prohibition

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against the police judge and the other appellants, enjoining and restraining them from proceeding further in the enforcement of the alleged void ordinance. Appellants answered, to which appellee filed a reply.

The real issue formed by the pleadings involves the validity of the ordinance passed by the city council and whether or not the police judge has the legal authority to enforce the ordinance by punishing those who violate it. It will be seen that the ordinance attempted to prohibit the sale of liquor within one-half mile of the corporate limits of the city of Latonia, excepting, however, from its provisions, a part of another municipality and a territory in Campbell county, and attempted to confer upon the police court of the city exclusive jurisdiction to try persons arrested for the violation of the ordinance. If this ordinance is valid, and the police judge of the city of Latonia has jurisdiction to try persons violating it, this court cannot interfere to restrain or prohibit the enforcement of it.

The third Constitution of Kentucky, the one in existence when the present Constitution was adopted, contained this provision: "The General Assembly may vest judicial powers, for police purposes, in mayors of cities, police judges, and trustees of towns." It will be seen by this provision that there was no limitation on their jurisdiction. It was left to the General Assembly, without any limitation, to fix the jurisdiction of officials named. Nor did the third Constitution place any limitation upon the General Assembly to prevent it from passing special acts. It then had, as now, power to pass any law not prohibited by the Constitution. The General Assembly, under the third Constitution, by special acts, had given police judges in some cities greater juris-

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diction than had been given justices of the peace. Their jurisdiction was not the same throughout the State, and some of them were not limited by the boundary of the city. Under these circumstances, and to correct the inequalities and errors mentioned, section 143 of the Constitution was adopted. It provides: "A police court may be established in each city and town in this State, with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the city or town in which it is established, and such criminal jurisdiction within the said limits as justices of the peace have." This section confers jurisdiction upon police courts of cities and towns in cases of violation of ordinances occurring within the corporate limits of the cities or towns.

The ordinance in question deals exclusively with offenses committed outside of the corporate limits of Latonia, and is based on subsection 27 of section 3490 of the Kentucky Statutes of 1903. It appears that the city licenses the sale of liquors within the limits of the city, and that liquors are sold within a mile of the limits of the city by others than appellee. Appellee claims that the ordinance is void because it (appellee) is discriminated against by so drafting it as to include its property within the prohibited territory and excluding favored ones engaged in a like business. In view of the conclusion we have reached with reference to the validity of the ordinance and statute upon which it is based, we deem it unnecessary to pass upon this question. Section 143 of the Constitution has been construed by this court in the case of Ingram v. Fuson, 118 Ky. 882, 26 Ky. Law Rep. 863, 82 S. W. 606. It was there held that the General Assembly had no power, under this sec-

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tion of the Constitution, to confer jurisdiction upon police courts to try offenses committed outside of the city or town limits.

Appellants contend that the General Assembly has the right to make one boundary of a city for taxation and other general purposes and another boundary for police purposes, and that this is what the General Assembly did by the enactment of subsection 27 of section 3490, and refers to the case of Falmouth v. Watson, 5 Bush, 660, to sustain the propositon. To this we cannot agree. Section 143 of the Constitution recognizes but one boundary of a city or town, and the jurisdiction of police courts is expressly confined within that boundary. The section deals exclusively with the jurisdiction of police courts in regard to police regulations, and will not permit of another boundary for that purpose. The opinion in the case referred to was delivered in 1869, long before the present Constitution was adopted. At that time the General Assembly was not limited or prohibited from passing such special laws, and the opinion was right under the then existing laws. In our opinion it was the enactment of this class of special legislation that caused the incorporation in the present Constitution of sections 59, against legislation, and 143, limiting the power of the General Assembly in conferring jurisdiction upon police courts of cities and towns.

It is claimed that this construction of section 143 is unfortunate, and it ought to be construed so that a separate boundary might be fixed for police purposes; otherwise around the city limits proper all sorts of crimes will be committed, which will annoy the people residing therein, and they should be permitted to protect themselves in the way provided in the statute referred to. This may be true; but with

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that we have nothing to do. Our duty is to see that the Constitution is not violated, and to construe and enforce it as it is written, and we should not bend it to suit what might happen to be the circumstances of the hour. Chief Justice Bronson, in an opinion in the case of Oakley v. Aspinwall, 3 N. Y. 547, 568, expressed in admirable words the respect the judicial and legislative departments of government should have for the Constitution, as follows: "It is highly probable that inconveniences will result from following the Constitution as it is written; but that consideration can have no force with me. It is not for us, but for those who made the instrument, to supply its defects. If the Legislature or the courts may take that office upon themselves, or if, under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set any boundary to the powers of the government. Written constitutions will be more than useless. Believing, as I do, that the success of free institutions depends upon a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for latitudinarian constructions which are resorted to for the purpose of acquiring power; some evil to be avoided or some good to be attained by pushing the power of the government beyond their legitimate boundary. It is by yielding to such influences that Constitutions are gradually undermined and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that

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process. But, if the Legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the Constitution which nothing can heal. One step taken by the Legislature or the judiciary, in enlarging the powers of the government, opens the door for another, which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

Notwithstanding the construction this court has given section 143 of the Constitution, the people of cities and towns will not be without police protection, and subjected to the annoyance of those who commit nuisances without the limits thereof. By an inspection of the present Constitution it will be observed that the General Assembly is not prohibited from giving police officers of cities and towns authority to make arrest and police territory beyond the limits thereof; and it has given them such authority under section 3495 of the statutes, and this court has construed that section, or one like it, and declared it legal, in the cases of Heather v. Thompson, 78 S. W. 194, 25 Ky. Law Rep. 1554, and Riley v. Grace, 33 S. W. 207, 17 Ky. Law Rep. 1008. Under these authorities the police of cities and towns are not confined in their duties to the boundary of the cities and towns. They, as well as constables, and sheriffs, can arrest persons guilty of offenses and take them before justices of the peace or county judges for their trial and punishment, or they can be brought to justice by information filed or indictment and tried in the circuit court. If appellee is committing the offense indicated, let the officials and citizens of the city see to it that it is prosecuted and punished as indicated,

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and in that way relieve themselves from the annoyance complained of. It is better to do this than to bend the Constitution to suit their conveniences and desires.

In our opinion the court did not err in granting to appellee the relief sought; hence the judgment is affirmed.

CASE 60.—ACTION BY GEORGE EMIG'S ADMINISTRATOR AGAINST THE MUTUAL BENEFIT LIFE INSURANCE CO. ON A POLICY IN SAID COMPANY ON THE LIFE OF DECEDENT.—December 18.

Emig's Admr. v. Mutual Benefit Life Ins. Co.

127 588
130 578
130 584

Appeal from Campbell Circuit Court.

A. S. Berry, Circuit Judge.

Judgment for defendant, plaintiff appeals — Reversed.

1. Insurance—Life Insurance—Dividends.—An insured in a life policy, dated March, 1893, providing for dividends, who borrowed money from the insurer for premiums due March, 1902, and who defaulted in the payment of subsequent premiums, is entitled to the dividends on his policy for the year 1903 in computing the amount available for extended insurance as provided in the policy.
2. Same—Borrowing Amounts of Premiums.—An insurance company in lending money to its policy holders occupies the same position as any other money lender, and is entitled only to collect the debt with 6 per cent. interest, and a contract allowing it to demand more will not be enforced.
3. Usury—Statutes—Enforcement.—The laws against usury prohibiting schemes resorted to by lenders to enable them to

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charge more than the legal rate of interest are rigidly enforced, and no plan will be allowed to defeat them.

4. Insurance—Life Insurance—Extended Insurance.—Where a life policy stipulated that if it should become void by the non-payment of any premium the entire net reserve should be applied for the purchase of extended insurance, a provision that if there was any loan on the policy the indebtedness should be paid out of the cash surrender value and the remainder paid in cash or applied for the purchase of extended insurance was void, because discriminating against a policy holder in debt to the insurer, and where an insured borrowed money from the insurer for the payment of the premiums and did not repay it and defaulted in the payment of future premiums, the insurer must ascertain the amount of the net reserve and deduct from it the amount of the debt and interest and use the balance for the purchase of extended insurance.

L. J. CRAWFORD, HAZELRIGG, CHENAULT & HAZELRIGG and R. A. NAGEL for appellant.

DODD & DODD and W. O. HARRIS for appellee.

(No briefs—Record misplaced.)

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

On March 20, 1893, the appellee company issued to George Emig a policy upon his life for the sum of $5,000, in consideration of $195, paid by him, and the agreement to pay annually a premium of $195 on the 20th day of March in every year during the continuance of the policy. The policy was an ordinary life policy, and was made payable to the insured. It contained several stipulations as to nonforfeiture, extended insurance, loan and cash surrender value; but, as in 1897 a new contract was made, and this substituted contract was in force from that time until the death of Emig, we will treat it as the contract

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under which the rights of the parties must be adjudicated. The contract of 1897 is as follows:

"* * * When after two full annual premiums shall have been paid on this policy it shall cease or become void solely by the nonpayment of any premium when due, its entire net reserve by the American experience mortality and interest at four per cent. yearly (provided there be no loan on the policy) shall be applied by the company as a single premium at the company's rates published and in force at this date, either, first, to the purchase of nonparticipating insurance for the full amount insured by this policy, or, second, upon the written application by the owner of this policy and the surrender thereof to the company at Newark within three months from such nonpayment of premium, to the purchase of a nonparticipating paid-up policy payable at the time this policy would be payable if continued in force. Both kinds of insurance aforesaid will be subject to the same conditions, except as to payment of premiums, as those of this policy. Third, if preferred the company will on the surrender of the policy fully receipted within the said three months pay as a cash surrender value its entire net reserve by the American experience mortality and interest at four and one-half per cent. yearly, less a surrender charge equal to one per cent. of the sum insured by the policy.

"If there be any loan on the policy such indebtedness shall be paid off out of the cash surrender value, and the remainder paid in cash by the company; or a value will be allowed by the company in the form of extended or paid-up insurance as above provided, the amount to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash surrender value.

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"If death shall occur within one year after the nonpayment of premium and during the term of extended insurance, there shall be deducted from the amount payable any premium that would have become due on this policy if it had continued in full force, also the amount of any indebtedness on this policy at time of such nonpayment of premium.

"The company will at any time while the policy is in full force loan up to the limit secured by its cash surrender value upon satisfactory assignment of the policy to the company as collateral security.

"The figures given in the following table are based upon the assumption that all premiums (less current dividends) have been fully paid in cash. The indebtedness, if any, may be paid off in cash, in which case the figures in the table will apply:

At End of Year.	Cash Surrender Value. Loan Value.	In Case of Lapse of Policy.		
		Extended Insurance.		Paid-up Policy.
		Years.	Days.	
5th	$400 00	5	218	$1 880
6th	497 55	6	134	1,050
7th	596 95	7	8	1,210
8th	698 30	7	206	1,370
9th	801 50	8	2	1,525
10th	906 45	8	130	1,675

Having paid the first premium when the policy was issued, Emig began to borrow money from the company to meet his subsequent premiums until on March 20, 1902, he owed the company $854.35. He defaulted in the payment of the premium which fell due March 20, 1903, and also in the one that became due March 20, 1904, and died on June 1, 1904. By the default in the payment of the premium on March 20, 1903, his

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policy became forfeited unless it was kept alive until his death by the nonforfeiture system set out in the contract heretofore mentioned.

It will be observed that a clause in this contract provides in part that "if there be any loan on the policy, such indebtedness shall be paid out of the cash surrender value and the remainder paid in cash by the company." It being conceded that on March 20, 1903, Emig owed the company $854.35, with interest from March 20, 1902, and that he defaulted in the premium due March 20, 1903, it is the contention that on that date he was only entitled to the cash surrender value of the policy, less the loan. The cash surrender value on March 20, 1903, according to the calculation made by the company, and which is shown by the table, was $906.45, and the loan and interest to that date being $905.61, it only left due Emig on that day 84 cents. It is further insisted for the company that if the other paragraph of this clause is put into operation, which provides, "or a value will be allowed by the company in the form of extended or paid-up insurance as above provided, the amount to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash surrender value," that the net reserve of the policy by the American experience mortality and interest at 4 per cent. was on March 20, 1903, $1,001.95, and that, reducing this in the ratio of the indebtedness to the cash surrender value, left only 90 cents to be applied to the purchase of extended insurance at the company's rates published and in force at the date of the policy, which sum would have purchased insurance for $5,000, for two days and no longer. So that, in either event, looking at the matter from the com-

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pany's standpoint, Emig is not entitled to recover more than 84 cents.

Emig's administrator insists that the provisions relied on by the company are against public policy and void, and that he is entitled to recover $5,000, less the amount of the note and interest thereon, and the premiums due in 1903 and 1904. It does not appear that Emig made any election, or requested or demanded any settlement of any kind from the company, and so the matter stood from 1903 until this suit was brought, when the company for defense set up that it did not owe Emig anything.

In the body of the policy it is provided that "in case the premiums shall not be paid on or before the several days hereinbefore mentioned for the payment thereof * * * then and in every such case this policy shall cease and determine, subject to the provisions of the company's nonforfeiture system as indorsed hereon with the accompanying table;" and further, "this policy while in force will participate annually in the company's distribution of surplus, and after two years will be incontestable except for nonpayment of premiums." The company does not distinctly claim a forfeiture of the policy by reason of the nonpayment of the note; but it insists that because of Emig's failure to pay the premium due on March 20, 1903, it had the right under the contract to deduct from the sum then due him on the policy ascertained according to its method of calculating the amount of its note and interest, and by this process a forfeiture was in effect accomplished.

It is true the contract gave it the right to make the character of settlement it did, but it remains to be seen whether or not the provisions of the contract under which the company elected to settle with Emig

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are valid and enforceable or void as against public policy. In brief, the question is, will provisions of a policy be upheld that give an insurance company the right to settle on a different plan with a borrowing policy holder from that adopted with the policy holder who is not a borrower, thereby enabling it to exact more than its debt and legal interest? Under the contract, if Emig had not been a borrowing member, after he had paid two full annual premiums the entire net reserve by the American experience mortality and interest at 4 per cent. yearly would be applied by the company as a single premium at the company's rates to the purchase of non-participating insurance for the full amount insured by the policy, or, upon his written application for the reserve would have been applied to the purchase of a nonparticipating paid-up policy, or, at his election the company would pay as the cash surrender value of the policy its entire net reserve by the American experience mortality with interest at 4½ per cent. yearly, less a surrender charge equal to 1 per cent. of the sum insured by the policy. But, if a policy holder happened to be at the same time a borrower from the company, and had defaulted in the payment of a premium, then the company under the contract had the right to deduct the indebtedness out of the cash surrender value and pay the balance in cash, or allow a value in the form of extended or paid-up insurance, the amount of such value to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash value. It will thus be seen that the borrowing and the nonborrowing members are not treated alike; that the nonborrower has advantages and privileges that are not allowed the borrowing member. To

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illustrate, if on March 20, 1903, Emig had not been indebted to the company, and had defaulted in the annual premium then due, he would have been entitled to demand from the company nonparticipating term insurance for the full amount of his policy for such period as the same could be purchased by its entire net reserve by the American experience mortality and interest at 4 per cent. yearly, or he could have demanded that the net reserve be applied to the purchase of a nonparticipating paid-up policy. But, being a borrower from the company, it claims the right to settle with him on an entirely different basis, and one that does not secure the benefits as a nonborrower he could have demanded. It must be kept in mind that the cash surrender value of the policy as fixed in the tables and under which the company settled its account on March 20, 1903, with Emig, is not the full value of the policy that he would have received if he was not a borrower. By its settlement the company did not deduct the amount of Emig's note with 6 per cent. interest and give him extended insurance for the time he was entitled to it. It arbitrarily adopted a method by which it exacted from him more than his debt and interest by failing to allow him credit for the full amount to which he was entitled.

To make plain the manner in which Emig was discriminated against, and the fact that the company exacted in the settlement it made more than the amount of its debt and legal interest, it is only necessary to direct attention to the admissions in the answer which show that the net reserve of the policy by the American experience mortality and interest at 4 per cent. was on March 20, 1903, $1,001.95, whereas the cash surrender value on that date was

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only $906.45. Electing as it did to take the amount of Emig's debt and interest, $905.61 from the $906.45, only left 84 cents due the assured. When if the debt had been deducted from the net reserve of the policy, which was $1,001.95, there would have been due him $95.50; but, upon a fair settlement, the amount due him would have been more than this because he was entitled to the dividend on his policy for the year 1903, which was not allowed him in fixing the amount at $1,001.95, as this sum only includes the dividends to March, 1902. Mutual Benefit Life Ins. Co. v. Davis, 115 Ky. 401, 24 Ky. Law Rep. 2231, 73 S. W. 1020. In computing under the other clause by which it allowed him a value to be applied to the purchase of extended or paid-up insurance, and finding that there was only due him 90 cents, it reduced the net reserve in the ratio of the indebtedness to the cash surrender value of the policy, and again discriminated against him and exacted more than the amount of the debt and legal interest.

We are wholly unable to perceive why an insurance company should be allowed to discriminate between its policy holders in this manner or exact indirectly more than legal interest. In lending money to its policy holders an insurance company occupies exactly the same attitude as any other money lender. It is entitled to demand and collect the amount of its debt with 6 per cent. interest thereon, and no more. It is true the contract allows it to demand more than this, and the right to require the borrowing member to pay a larger sum than his debt and interest; but this character of contract, no matter how carefully it may be worded, or how skillfully devised, will not be enforced. When the company lends money and takes as security for the loan a policy that amply

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secures it, there is no reason why it should be allowed privileges or rights not extended to ordinary money lenders. Our laws against usury, and other devices and schemes resorted to by lenders to enable them to charge debtors more than the legal rate of interest, are rigidly enforced, and no plan, however ingenious, will be allowed to defeat them.

Viewing the matter from this standpoint, what were the rights of the respective parties on March 20, 1903, when Emig defaulted in the payment of the premium then due? He owed the company $854.35, with interest thereon from March 20, 1902, and the company as security for this had a lien upon his policy. On that date the company had the right to ascertain the amount under the contract that Emig, treating him as a nonborrower, was then entitled to, which was the entire net reserve by the American experience mortality and interest at 4 per cent. yearly, and to deduct from it the sum of his note and interest, and for the difference, if any, he was entitled—as he made no election—to extended insurance for the full amount of his policy for such period as this balance would carry it. If on March 20, 1903, Emig had not been a borrower from the company, the premiums he had paid would under the contract and tables have carried his insurance for the full amount for 8 years and 130 days. But, being a borrower, with his policy pledged to the company as security for the loan it had the right on that day to demand the payment of its loan and give Emig on the basis herein indicated nonparticipating term insurance for the balance due. The fact that Emig had paid a sufficient number of premiums to carry his insurance 8 years and 30 days, did not give him the right to insist that the company must carry his full insurance for that period of time

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and take out of it if he died within that period the amount of his debt with interest. This conclusion would give the insured the unreasonable advantage of having the full amount of insurance in force for a period of 8 years and 130 days, during all of which time he would be indebted to the company in the full amount of the loan value of his policy, and this without the payment of either premiums on the policy or interest on his note. The result would be that Emig's debt would be increasing and the value of his policy decreasing, until at the expiration of the 8 years and 130 days the company would have his note and as security a policy without value. To put it in another way, if he had outlived the period of extended insurance, the policy that the company accepted as security for the note would have lapsed entirely and been of no value, and consequently the company would have no security for the money advanced on it if the insured was insolvent, and yet the insured during this time would have had in his pocket practically the full value of the policy and on his life insurance for the full amount of the policy. Jagoe v. Aetna Ins. Co., 96 S. W. 598, 29 Ky. Law Rep. 984; Penn Mutual Life Ins. Co. v. Barnett's Adm'r, 96 S. W. 1120, 29 Ky. Law Rep. 1234. But provisions in a policy that give the company the right to take undue advantage of the insured, or that allow it the right to arbitrarily adopt a method by which it may indirectly exact from a borrowing member more than the debt and interest due by him, or to settle an indebtedness upon an erroneous and unfair basis, and one that will in effect work a forfeiture of the policy, will not be enforced. They are against public policy and void. New York Life Ins. Co. v. Curry, 115 Ky. 100, 24 Ky. Law Rep. 1930, 72 S. W. 736, 61

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L. R. A. 268, 103 Am. St. Rep. 297; Mutual Life Ins. Co. v. Twyman, 89 S. W. 178, 28 Ky. Law Rep. 167. These principles do not, of course, deny to an insurance company the right to declare a policy forfeited or lapsed for nonpayment of premiums, or prevent it from providing options in its policy between which the insured may elect and that will bind him when an election has been made. These are reasonable conditions, and are not in the same class as the carefully adopted clauses that discriminate against borrowing members.

In support of its right to settle with Emig in the manner it did, the company relies upon the case of Mutual Benefit Life Ins. Co. v. First National Bank, 115 Ky. 757, 74 S. W. 1066, 25 Ky. Law Rep. 172. There the contract and policy contained the same provisions as the one in the case at bar, in fact it was issued by the same company. Sudduth, who was the policy holder and who had paid the premiums for 12 years, borrowed from the company on the policy $599.32, payable July 30, 1899, on which date his note fell due, but neither the note nor premium was paid. Sudduth died the following November. In a suit on the policy the company set up the defenses that are here made—the only difference being that here the company found a ballance due Emig of 84 cents, whereas in the Sudduth Case the amount of the note and interest was exactly the amount of the cash surrender value of the policy. This court—three of the judges dissenting—held that the company was entitled under the contract to make a settlement similar to the one made by the company with Emig.

The case of New York Life Ins. Co. v. Meinken's Adm'r, 80 S. W. 175, 25 Ky. Law Rep. 2113, also relied on by appellee, is not in point. It appeared that

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on November 8, 1893, the appellant insured the life of Meinken for $2,500, in consideration of $59.50 payable annually on the 8th of November in each year. The policy provided for extended insurance. The annual premiums were paid for the first three years in cash, and entitled the insured under the tables contained in the policy to extended insurance for the full amount of the policy up to April 8, 1899, or if he demanded it paid-up insurance for $167. Meinken defaulted in the payment of a premium note due in 1897, and died in February 1901. In a suit by his administrator to recover $2,500, the full amount of the policy, the company denied liability, and alleged that the premiums paid did not carry the policy under the terms of the contract up to the date of the death of the insured, and that the policy had lapsed. In the course of the opinion, this court said: "In case of default in the payment of the annual premium, the insured had two options, first, the policy provided that he should be entitled to extended insurance for the full amount of the policy for a definite period, or, second, that if the insured should make demand therefor, and surrender the policy within six months after default, he was entitled to paid-up insurance for a stipulated sum. But he could not claim both of these surrender values. Having failed to demand paid-up insurance, the policy by its terms continued in force for the full amount of $2,500 for a definite period, but which had expired before his death." Here it will be observed that the insured defaulted in the payment of a note given for the premium, which was in effect the same as if he had failed to pay a premium, and the court held that, having failed to make an election within six months or at all, the company under the terms of the policy gave him

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extended insurance for the full amount for the full period to which under the tables he was entitled to extended insurance, and under the tables he was only entitled to extended insurance to April 8, 1899; and, consequently, as said by the court: "Having failed to demand paid-up insurance, the policy was by its terms continued in force for the full amount of $2,500 for a definite period, but which had expired before his death."

Nor is Mutual Benefit Life Ins. Co. v. Harvey, 117 Ky. 834, 25 Ky. Law Rep. 1992, 79 S. W. 218, authority for appellee. In that case Harvey paid the first five annual premiums on his policy, but failed to pay the one due in November, 1892, and the policy lapsed in accordance with its terms at that date. Harvey died in 1902. Suit was brought against the company to recover $507, the amount of paid-up insurance, which under the contract it was claimed Harvey was entitled to in November, 1892, when he defaulted in the payment of premiums then due. The contract of insurance provided that the policy holder if after paying two full premiums defaulted in the payment of a premium, the amount due him should be applied "first to the purchase of nonparticipating term insurance for the full amount insured by this policy, or, second, upon the written application by the owner of this policy and surrender of the policy, to the company at Newark within three months from such nonpayment of premium, to the purchase of a nonparticipating paid-up policy payable at the time this policy would be payable if continued in force." In its answer the company averred that as no written application was made for paid-up insurance it gave to Harvey nonparticipating term insurance for the full amount of the policy for 3 years and 134 days, this

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being the extended insurance which the amount due him would purchase. The court, in upholding the contention of the company, said: "It will be observed that the nonforfeiture provisions of the policy provided that the insured shall be entitled to the first-named, or term, insurance, for the full amount of the policy, unless he makes application and surrenders his policy at his default. But he failed to make such application. And there can be no question under the terms of the policy that such application and surrender by the beneficiaries of the policy is a condition precedent to the issual of paid-up insurance; otherwise it became the duty of the company without application or request to set aside for the benefit of the insured extended insurance for the full amount of the policy."

It will therefore be observed that in the Meinken and Harvey Cases the insured failing to elect which option they would accept, the company made the only election it was authorized by the contract to make, and this election the court held binding on the insured.

There is no conflict between the doctrine announced by us in the case at bar and the opinions in these cases. We do not hold that there may not be options given in a policy, nor that if the insured fails to elect the company may not make an election for him. We are dealing distinctly with the rights of a borrowing member, and the principles announced are fully sustained by the opinions in Mutual Benefit Life Ins. Co. v. Davis, 115 Ky. 404, 24 Ky. Law Rep. 2231, 73 S. W. 1020; Penn Mutual Life Ins. Co. v. Barnett's Adm'r, 96 S. W. 1120, 29 Ky. Law Rep. 1234. The First National Bank Case, supra, in so far as it conflicts with this opinion, is overruled.

We are not prepared to say upon the record before

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us what balance was due Emig on March 20, 1903, computed upon the basis herein indicated. Upon a return of the case, evidence may be taken by both parties, and the court will ascertain and adjudge the full amount that Emig was entitled to on March 20, 1903, and after deducting therefrom the amount of his debt and interest, will compute the period for which the balance due would purchase entended insurance, and if the extended insurance carried the policy beyond the time of Emig's death judgment will be rendered in favor of appellee for the amount of the policy and interest from the time it was due; otherwise the judgment will be for appellant.

Wherefore the judgment is reversed, with directions for a new trial consistent with this opinion.

CASE 61.—ACTION BY THE COMMONWEALTH BY GEORGE ALEXANDER, REVENUE AGENT, AGAINST S. E. LEDMAN TO RECOVER TAXES ON STOCK IN THE LOUISVILLE TRACTION CO.—December 18.

Commonwealth v. Ledman

127 603
135 330
135 789

Appeal from Jefferson Circuit Court; Chancery Branch; Second Division.

SAMUEL B. KIRBY, Judge.

From a judgment dismissing the petition the plaintiff appeals—Affirmed.

1. Taxation—Taxable Assets—Corporations—Organization Expenses.—Money paid by a corporation for the purpose of effecting an organization or putting the company into legal shape to do business is not a taxable asset in the hands of

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the company, as the value of the corporation's franchise is not dependent on the amount expended in creating it.

2. Same—Foreign Corporations—Payment of License Fees.—That a corporation, organized in New Jersey, but doing all of its business in Kentucky, was required to pay an annual license fee to the State of New Jersey to continue its corporate existence, did not enhance the value of its franchise taxable in Kentucky.

3. Same—Taxation of Corporate Shares—Statutes.—Ky. Stats., 1903, section 4085, provides that the property of all corporations, except as otherwise provided, shall be assessed to the corporation, and that so long as the corporation pays the taxes on all of its property the stockholders shall not be required to list their shares for taxation. Held, That under Constitution section 171, providing that all taxation shall be equal and uniform, section 4085 was applicable to foreign as well as domestic corporations.

4. Statutes—Construction.—Where a statute is susceptible of two constructions, one inequitable and unjust, as well as rendering the statute unconstitutional, and the other rendering the act valid and equitable, the latter construction will be applied.

5. Taxation—Foreign Corporations—Holding Companies—Shares of Stockholders.—A Kentucky railway company, desiring to increase its capital, procured the organization of a foreign corporation, with additional rights and powers, which, however, owned no property and exercised none of its powers, except to hold the stock of the railway company, for which the holding company's stock was exchanged according to a specified proportion; the only assets of the holding company being the stock in question, and the amount paid to it by the railway company to be disbursed to the holders of its stock as dividends. Though the nominal capital of the holding company exceeded that of the railway company, the only property represented was that owned by the railway company, on which full taxes were assessed and paid. Held, that the shares of the holding company were not subject to taxation, under Ky. Stats., 1903, section 4085, providing that, if the assets of a corporation are fully taxed and taxes paid by it, its shares shall not be taxable to the holders.

6. Same—Franchise—Right to be a Corporation.—A foreign corporation, organized merely to hold stock of another corporation, so long as it never acquired any property or engaged in any business, was not taxable; its "right to be" a corporation being of no taxable value.

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7. Same—Removal of Causes.—A foreign corporation's right to remove actions against it to the federal court does not give to its shares a taxable value, under the rule forbidding the States to abridge rights guaranteed by the federal Constitution by a State tax.
8. Same—Capital Stock—Valuation.—Under Ky. Stats., 1903, section 4079, requiring the board of valuation and assessment to value the capital stock of railway companies for taxation, the board in its valuation must consider every element of property, tangible or intangible, owned by the company, together with the corporation's franchise and earning capacity; but the board, in making the valuation, is not governed by the property value of the railway company's shares.
9. Same—Revaluation.—Where all the property of a railway company was valued for taxation by the board of valuation and assessment for certain years, a revaluation for those years could not be made.

M. J. HOLT and B. F. WASHER for appellant.

HUMPHREY & HUMPHREY and L. R. YEAMAN for appellee. (No briefs—Record misplaced.)

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

The question involved in this appeal is the right of the State, under existing laws, to tax the shares of the Louisville Traction Company in the hands of their owner. Proceedings were instituted in the Jefferson county court, under section 4241 of the Kentucky Statutes of 1903, to assess for the purpose of taxation in the hands of appellee certain shares of stock which he owned in the Louisville Traction Company as of September 15, 1903, September 1, 1904, and September 1, 1905. Appellee denied the right of the State to have said stock assessed on the ground that it was fully tax-paid. The county court having decided in favor of appellee, the Commonwealth appealed to the circuit court; and, the circuit court hav-

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ing likewise ruled against the Commonwealth, it has appealed to this court.

It appears that appellee's stock was not issued until April 1, 1904, and that on September 15, 1903, appellee owned merely the right to have the stock issued to him at a later date; but, inasmuch as he owned the property which was surrendered up to the Louisville Traction Company in consideration for its issuing the shares in question, the case may be treated as though the shares of stock were on September 15, 1903, in actual existence. This brings us, then, to the consideration of the question: Was this stock of the Louisville Traction Company in the hands of appellee subject to taxation on September 15, 1903, September 1, 1904, and September 1, 1905? or was it tax-paid, and therefore not subject to further assessment and taxation under existing laws? In order to arrive at a proper determination of this question, it is necessary to go somewhat into the history of the organization and formation of the Louisville Traction Company.

Some time prior to the year 1903 all of the street railway lines in the city of Louisville were merged into one corporation, known as the "Louisville Railway Company." At that time, owing to the growth and development of the city of Louisville, it became necessary for the Louisville Railway Company to extend its lines and make certain betterments and improvements in its properties. In order to do this it either had to issue bonds or increase the issue of its stock and sell same for the purpose of raising the necessary money. It was deemed advisable at that time to raise $1,750,000 for the purposes which have been designated. The Louisville Railway Company had issued both preferred and common stock.

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By reason of the growth of the city and the steadily growing business, the value of the common stock very much exceeded that of the preferred, and in 1903 the common stock was selling in the open market for about $175 per share. The company did not deem it wise to further increase its bonded indebtedness, and elected to raise the desired money by issuing and selling common stock. A dispute arose between the holders of the preferred and the holders of the common stock as to who had the right to receive and pay for this common stock when issued; it being the contention of the common stock holders that, as the dividend on the preferred stock was guaranteed and secured to the preferred stock holders before any dividend could be paid on the common stock, they should have no voice in the sale of the common stock, and that the common stock holders alone should have the right to receive and pay for such common stock as was issued. To this proposition the preferred stock holders refused to agree. As a result of this disagrement it was finally determined that a "holding company" should be formed, and that this "holding company" should issue certificates of preferred and common stock, in exchange for the stock of the Louisville Railway Company, and that a fair and equitable adjustment of the differences existing between the preferred and the common stock holders would be to have the "holding company" issue one share of preferred stock in the "holding company" and one-fifth of a share of common stock in the "holding company" to the preferred share holders in the railway company in exchange for each share of preferred stock in the railway company, and to issue to the share holders of common stock in the railway company three shares of common stock of the "holding company" in ex-

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change for one share of common stock in the railway company and a "bonus" of $55; or, in other words, each share of preferred stock in the railway company was entitled to receive one share of preferred stock and one-fifth of a share of common stock in the "holding company," and each share of common stock in the railway company was, when surrendered up, together with $55 in cash, entitled to receive three shares of common stock in the "holding company." It was further agreed that, if any additional shares of common stock became necessary, the preferred stock holders, should have no voice in determining the amount of stock that should be issued or the disposition that should be made thereof. Upon investigation it was found that the laws of this State would not permit of this discrimination against the preferred stock holders in the conduct of the affairs of the company, and it was therefore found necessary that the "holding company" should be incorporated in some State where this provision of the agreement would not be in conflict with the general laws. For this reason, and for this reason only, the Louisville Traction Company, which was organized for the sole purpose of acting as a "holding company" for the share holders of the Louisville Railway Company, was organized under the laws of the State of New Jersey.

Notice of the plan agreed upon for the settlement and adjustment of the differences between the common and preferred share holders was sent to each of the stock holders of the Louisville Railway Company, with the request that, if they approved of the plan of settlement and adjustment and desired to participate therein, they would deposit their stock at the place designated by the officers of the Louisville Traction Company, for the purpose of having the plan of ad-

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justment carried into effect. That this proposed settlement was acceptable to the stock holders of the Louisville Railway Company is evidenced by the fact that more than 99 per cent. of all of the stock of the Louisville Railway Company accepted the proposition and deposited its stock (the common stock holders paying the necessary amount of money), and all so doing were issued certificates of stock, according to the terms of the agreement, in the Louisville Traction Company, in exchange for their stock in the Louisville Railway Company. In order to perfect and carry out this arrangement, some considerable time was necessary, and between September, 1903, and April, 1904, the transfer was made. The stock of the Louisville Traction Company was not issued to holders of shares in the Louisville Railway Company until some time in April, 1904, although the shares were surrendered up by them along during the fall and winter of 1903 and 1904. During the formative period above referred to the traction company received large sums of money from the holders of common stock in the Louisville Railway Company under the terms of the agreement. This money was from time to time turned over by the Louisville Traction Company to the Louisville Railway Company, to be used for the purpose of making extensions and betterments. The record discloses that upon one assessment period there was a large sum of this money in the hands of the traction company. This, in another proceeding, the traction company was required to list and pay taxes on. On the other assessment periods covered by this litigation there was no fund in the hands of the Louisville Traction Company. All of the stock holders of the Louisville Railway Company not having accepted this proposition,

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it became necessary for the company to retain its corporate existence. This it has done, and annually, as required by law, the officers of the Louisville Railway Company have made out and filed the reports that the proper taxing authority, which is the board of valuation and assessment, desired, and it has at all times been amenable to the orders and directions of the board of valuation and assessment, in so far as furnishing any desired information relative to the conduct of its business is concerned. These reports, as made and furnished by the railway company, have been received by the board of valuation and assessment, and based upon them the property, including the tangible property, as well as the value of the franchise of the Louisville Railway Company, has been annually assessed and the taxes paid thereon by the Louisville Railway Company, as fixed and determined in said assessment.

There is no complaint on the part of the Commonwealth that any part of the tangible property of the Louisville Railway Company has escaped taxation, or that its franchise has not been fully and fairly valued for taxation. The contention of the Commonwealth is that inasmuch as the Louisville Traction Company is a foreign corporation, a separate and distinct organization, holding a charter giving it many rights and privileges which, if not now enjoying and exercising, it may later exercise and enjoy, and for which it pays to the State of New Jersey an annual license tax of $4,000 or more, therefore its stock cannot be said to be tax-paid because the Louisville Railway Company has been fully assesssed and its taxes paid. Stress is laid by the Commonwealth upon the fact that it cost something like $20,000, attorney's fee and other expenses, in order to organize and incorporate

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the Louisville Traction Company under the laws of New Jersey, and that it pays annually to said State a license tax for the privilege of continuing in existence. We are unable to see wherein the payment of any sum of money, large or small, for the purpose of perfecting an organization or putting the company into legal shape to do business, can be regarded as a taxable asset in the hands of the company, or as giving to the company so organized any greater value than if its organization had been perfected without incurring any expense. The value of a franchise is not dependent in any sense upon the amount of money which is expended in creating it; but, on the other hand, we can readily see how the value of a franchise might be materially lessened because of the expenditure of a large sum of money in creating it, or in effecting its organization. Nor is the value of the franchise of the Louisville Traction Company in any wise enhanced because it is required to pay annually a license tax to the State of New Jersey for the purpose of continuing its corporate existence, any more than its value is enhanced by reason of its having to pay, under existing laws in this State, an annual license tax in order that it may continue to do business in this State. If the contention of the Commonwealth in this particular was sound, then the value of the franchise would be increased in proportion to the amount of the license tax—the larger the license tax, the greater the value of the franchise; but, on the contrary, we are rather inclined to the opinion that the converse of this proposition would more nearly represent the correct theory.

The contention of appellant that these shares should be taxed because the traction company is a foreign corporation is not well taken. Section 4085

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of the Kentucky Statutes of 1903 applies alike to all corporations, and it is immaterial where the corporation is organized; the sole question being, where is its property? If all of the property of the corporation is in Kentucky, and has been taxed in Kentucky, then its shares of stock ought not again to be taxed, no matter where the corporation is incorporated. The State is not interested in the question of organization; but its aim is to reach and tax the property of every description owned by the corporation, and if this has been done the ends of the law have been fully met and the purpose of the statute satisfied. This particular point in the construction of this statute has never been passed upon by this court; but in Michigan and Ohio, with a similar provision in their tax laws to section 4085 of our statute, it has been held that, where the property of a foreign corporation is in the State and taxed, the shares of stock in such corporation are not subject to further assessment and taxation, any more than they would be if the corporation in question were domestic, instead of foreign. Stroh v. Detroit, 131 Mich. 109, 90 N. W. 1029, and Hubbard v. Brush, 61 Ohio St. 252, 55 N. E. 829. The Constitution (section 171) provides that all taxation shall be equal and uniform, and the Legislature, in enacting section 4085 of the statute, must have intended that it should apply alike to foreign and domestic corporations where all of their property is in this State; otherwise, not only the spirit but the very letter of the Constitution would be violated thereby, and the purpose and aim of the lawmaking power, as construed by this court, to avoid double taxation, would in many instances be defeated. It is a uniform rule of construction of this court that, where there is a doubt as to the meaning of a statute,

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that construction is placed upon it which will make it nearest conform to the fundamental laws as expressed in the provisions of the Constitution, and, where one construction will tend to work a hardship and another construction to relieve an inequitable and unjust burden, the latter construction is invariably given. Where one construction would produce double taxation, and another avoid it, the latter is applied. Livingston v. Paducah, 80 Ky. 656, 4 Ky. Law Rep. 171; Aetna Life Insurance Company v. Coulter, 115 Ky. 787, 25 Ky. Law Rep. 193, 74 S. W. 1050; Cumberland Telephone & Telegraph Company v. Hopkins, 90 S. W. 594, 28 Ky. Law Rep. 846; Commonwealth v. Bank of Commerce, 118 Ky. 547, 26 Ky. Law Rep. 407, 81 S. W. 679. This same rule of construction has been adopted with a degree of uniformity throughout the several States; hence it follows that the only fair construction to place upon section 4085 of our statute is that which conforms nearest to the requirements of the Constitution and will produce equity and equality in the burden of taxation, to-wit, that it applies alike to foreign and domestic corporations, where all of their property is in the State of Kentucky.

This being true, we come next to address our attention to the question as to whether or not all of the property of the Louisville Traction Company is in fact in Kentucky, and whether or not all of the property it has in Kentucky is the property of the Louisville Railway Company? The tendency of courts in recent years is to look to the substance, rather than to the forms, of transactions, as is aptly illustrated by the rulings of the court in the cases of Northern Securities Company v. United States, 193 U. S. 301, 24 Sup. Ct. 436, 48 L. Ed. 679, State v. St. Paul Depot Company, 156 Pa. 488, 26 Atl. 1071. For the purpose

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of taxation the State is not interested in the question as to whether or not the shares are held by an individual for himself, or by some one else as representative, agent, trustee, depositary, custodian, or holder. Nor can it make any difference for the purposes of taxation that a corporation, which is but an artificial person, holds this stock in a fiduciary capacity, instead of an individual. Neither the character nor the value of the property is changed because it is held by a trustee or agent, whether that trustee or agent be a natural or an artificial person. Nor can it affect the value of the property that the trustee holding same should be designated a "holding company." It is immaterial, so far as the State is concerned, that the property of the Louisville Railway Company is split up or divided into legal and equitable shares or estates. More than 99 per cent. of all of the stock of the Louisville Railway Company is held by the traction company, under an agreement entered into between the share holders representing this amount of stock in the Louisville Railway Company. The remaining fraction of 1 per cent. of the stock of the Louisville Railway Company is still in the hands of its original owners. Can it be said that this 99 and a fraction per cent. of the stock of the railway company has an increased value because of the fact that it is held by the Louisville Traction Company, as trustee or agent for the original holders? Can it be successfully contended that, because it is so held, it should bear a burden of taxation greater than that portion of the stock which is in the hands of the original owners and not in the hands of the trustees? We think not. The fact that it has been deposited with the "holding company," and that this "holding company" has issued trustee's certificates, as it were, in

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lieu of the original stock, does not warrant the imposition upon the property represented by this original stock of any additional burden of taxation.

But the contention of the Commonwealth is that these shares are issued by the Louisville Traction Company, and the Louisville Traction Company is a separate and distinct corporation, with many charter rights and privileges, and for this reason the shares which it has issued should be made to bear a part of the burden of taxation. This contention would be entirely right and proper, since the traction company has not reported and paid upon its franchise, as provided by section 4088 of the Kentucky Statutes of 1903, if it were shown that the Louisville Traction Company had any property whatever anywhere, other than that represented by the shares of stock of the Louisville Railway Company, which it had deposited with it and for which it issued its shares of stock in exchange. Likewise the contention of the Commonwealth would be true if the Louisville Traction Company were exercising any of the rights and privileges which its charter empowers it to exercise, other than acting as a "holding company" for the stock of the Louisville Railway Company. It has these rights and privileges, just as any other trustee has rights and privileges which he might exercise; but it cannot be contended that, because a trustee might exercise other rights and privileges, therefore the trust fund in his hands has a greater value than it would otherwise have. The "right to be" is not a subject of taxation under either the laws of this State or the laws of New Jersey. The "right to be" is not an item of property at all. Under the laws of New Jersey three persons may form a corporation, just as under section 538 of the Kentucky Statutes of 1903 three per-

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sons may organize for the purpose of forming a corporation for general purposes, or as under section 673 any seven persons may form a corporation to construct a railroad. But we do not understand that the mere formation of a corporation under our laws creates property which is subject to taxation. If a corporation was formed with a capital stock of $1,000,000, all that the State would require would be that the expenses provided for by statute in the way of organization tax or fee should be paid. Such corporation, merely upon complying with the requirements of the statute and the payment of the incorporation tax, would have the right to do business—in other words, the "right to be," to "exist;" but this "right to be" would not be an element of property that could be taxed. It might exist for any number of years; but, if it never acquired any property or engaged in any business, its "right to be" would have no taxable value. It would have no cash value, and no assessment value. A corporation so formed would likewise have a right to transact business; but until it acquired property or actually transacted some business it would have absolutely no value, and hence would not be a subject of taxation. As said in the case of Cumberland Telephone & Telegraph Company v. Hopkins, 90 S. W. 594, 28 Ky. Law Rep. 846, in speaking of the value of a corporate franchise: "The value will depend largely upon its money-earning capacity as it may be employed, and depends at last upon its being exercised." Nor can its "right to be" ever become an element of property that is subject to taxation. Its "right to be" can merely authorize or give it the "right to do," and, whenever this "right to do" is exercised or utilized by acquiring property or engaging in business, then that property

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or that business would be subject to taxation, and the amount of that taxation would depend altogether upon the value of the property acquired or the amount of business done. So long as the traction company, therefore, owns no property, other than the stock of the Louisville Railway Company, which has been placed in its hands under the terms of the agreement entered into between the stock-holders of the Louisville Railway Company participating in that agreement, and is engaged in no business other than the holding of those shares and the paying over to those holding its certificates, representing those shares, such dividends as are from time to time apportioned to it, its shares are exempt from taxation, because the entire property which they represent is fully tax-paid, and therefore, by virtue of sections 4085 and 4088 of the Kentucky Statutes of 1903, it is relieved from paying the taxes a second time.

It is also insisted for the Commonwealth that the Louisville Traction Company, being a foreign corporation, when questions of dispute arose between it and citizens of Kentucky, would have a right to have that question transferred to and determined in the United States court, and that this right gives to its shares a value which should be taxed. No authority is cited to sustain this contention, nor do we believe that any can be found. This is a right which is guaranteed to a citizen by the federal Constitution. It has no taxable value, and, should the State attempt to put a value upon this right to abridge it in any way, it would be a violation of the federal Constitution. It is a well-settled principle that no right which is guaranteed by the federal Constitution can be abridged, or burdened, or incumbered by a State tax. However, since the record in the case before us shows

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that the traction company is engaged in no business whatever, other than paying over the dividends which it receives from the railway company to its stock holders, it is not the subject of litigation which could be removed to the federal court. It does not operate the railway company, could not be sued for damages, and any liability for personal injury must be brought against the Louisville Railway Company; and the Louisville Railway Company, being a Kentucky corporation, could not remove its cases to the federal court, but must try them in the State courts, just as it would if the "holding company" had never been formed.

We come next to consider the only remaining question in the case, and that is the contention of the Commonwealth that the difference in capitalization between the Louisville Railway Company and the Louisville Traction Company should be assessed. The Louisville Railway Company has 25,000 shares of preferred stock and 46,000 shares of common stock, each of the par value of $100 per share, making a total of $7,100,000 par value. The traction company has 25,000 shares of preferred stock, and 110,000 shares of common stock, each of the par value of $100 per share, making a total capitalization of $13,500,000 par value. There is a difference, therefore, in the par value of the capitals of these two companies of $6,400,000; and yet these capitalizations are based upon the same identical property, the tangible property of the Louisville Railway Company, to which must be added the value of its franchise. The excess, then, of the aggregate of the par value of the traction company over the aggregate par value of the railway company cannot represent actual property. The par value of a share of the stock of a corpora-

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tion has no necessary relation to the actual value of such stock. For instance, two corporations may be engaged in the same business, owning similar plants and stocks of raw material of exactly the same value. The business of the corporations may be exactly the same in extent and value. The taxable value of the corporations would be precisely the same. Yet, if one had twice as many shares of stock as the other, the market value of the one would necessarily be double that of the other. For the purposes of taxation we look, not to the par value, but to the actual value, of the shares. In order to throw light upon the actual value, many items are taken into consideration, of which the par value of the shares is but one. The earning capacity, as represented by the net profits after taking the operating expenses from the gross receipts, is a far more potent factor in determining the taxable value of the shares of a corporation than is the par value. The question to which the taxing authority must address its inquiry is: What property gives value to the stock of the Louisville Traction Company? The record shows that the stock of the Louisville Railway Company is the only property owned by the Louisville Traction Company, and hence this stock alone gives value to the shares of the Louisville Traction Company. The difference in par value between the stocks of the two companies can furnish no aid in arriving at a determination as to what is the true taxable value of the Louisville Traction Company. While it is true that the capitalized value of the Louisville Railway Company is much less than that of the Louisville Traction Company, yet as a matter of fact the market value of the two stocks at the time of the organization of the "holding company" furnishes a most apt illustration of the

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fact that, although capitalized at a much larger sum, the Louisville Traction Company stock is in fact worth no more in the aggregate than is the stock of the Louisville Railway Company; for we find that at the time the "holding company" was organized the common stock of the Louisville Railway Company had a market value of about $175 per share, and for each share of common stock in the railway company, plus $55, the holder received three shares of common stock in the traction company. Hence, each share holder contributed $230 for every three shares of stock in the traction company which he received, and the market value of the common stock of the traction company was $75 per share. Hence each share of common stock in the railway company, plus $55, was actually worth its equivalent of three shares in the traction company, as shown by the value of each stock in the open market.

The total assessment of the railway company, as fixed by the board of valuation and assessment in 1904, was $8,500,000. It is not contended that any property of the Louisville Railway Company was omitted by the board in the assessment as of September 15, 1903, or in its assessment as of September 1, 1904, or that there was any substantial change in conditions during this time. On September 1, 1905, the value of the traction company's stock had increased, and on said date the board of valuation and assessment raised the assessment of the railway company from $8,500,000 to $9,500,000. Whether this increase in valuation was due to the increase in the market price of the traction stock or to an increase in the net earnings of the railway company, the record does not disclose; but, as it is a well-known fact that the market value of all stocks is more or less

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influenced by conditions and circumstances which have no direct bearing upon the actual value of the stock, it is not unlikely that this increase was due to the showing made in the report filed by the Louisville Railway Company that its net income had been greater the year just passed than it had during the preceding year. The only income of the traction company was the money which it received from the railway company for dividend purposes, so that, had the traction company reported, it could have given the board of valuation and assessment no information on the question of income which had not already been supplied in the report made by the railway company. This record shows that the Louisville Railway Company paid in dividends for the preceding year $342,083.33. It is alleged that this sum was the total income of the traction company; and this is not denied, for the reason, we presume, that it could not be. Under section 4079 of the Kentucky Statutes of 1903 the duty of the board of valuation and assessment was to value the capital stock of the railway company, and in order to do this it had to take into consideration in its valuation, every element of property, tangible or intangible, owned by that company. In fixing this valuation the board is not governed by the property value of the railway company's shares (as decided in Henderson Bridge Company v. Commonwealth, 99 Ky. 623, 17 Ky. Law Rep. 389, 31 S. W. 486, 29 L. R. A. 73); but it must take into consideration its franchise, its earning capacity, and its assets of every description. From the report, as filed by the company, and such other information as it may possess, it assesses the property at a fair valuation, and when once so assessed the action of the board is final and conclusive, and no further action can be

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taken looking to a further assessment or revaluation of the property. Coulter v. Louisville Bridge Company, 114 Ky. 42, 24 Ky. Law Rep. 809, 70 S. W. 29. In the present case, the board having acted and valued this property as of September 1, 1904, and again as of September 1, 1905, and the record in this case showing that the property so valued by the board is all, and in fact the identical, property which was represented by the stock of the Louisville Traction Company on those dates, no further assessment or revaluation can be made thereof; and yet that is what the effort of the Commonwealth amounts to.

If it was shown that there was any property, tangible or intangible, belonging to the traction company, other than its shares of stock in the Louisville Railway Company, then the Louisville Traction Company should be required to pay taxes upon such property. There is no such showing made in this case. It is the policy of the law that all property of whatever kind or description should bear its just proportion of the public burden of taxation; that it should be taxed once, and no more, during the same taxing period; and, where it is shown that the actual property which is here sought to be taxed has been assessed and the taxes paid thereon by the Louisville Railway Company, then this same property, though represented by the certificates of the Louisville Traction Company, is not subject to further taxation in the hands of the share holders. It will be observed that these owners and holders of stock in the Louisville Railway Company, who entered into the contract out of which the "holding company" grew or was created, surrendered up their shares of stock in the railway company and received in lieu thereof certificates of stock in the Louisville Traction Company.

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These certificates of stock in the Louisville Traction Company are but the representatives of the original stock which they held in the Louisville Railway Company, and are no more subject to taxation in the hands of their owners than the shares of the Louisville Railway Company were in the hands of their owners, prior to the organization of the "holding company."

For the reasons given, the judgment is affirmed.

CASE 63.—ACTION BY HENRY HERTLE AGAINST ALICE RIDDELL, CAVE HILL CEMETERY AND OTHERS TO SECURE A MANDATORY INJUNCTION REQUIRING THEM TO REMOVE FROM THE CEMERTY LOT THE BODY OF A DOG BURIED THERE. —December 18.

Hertle v. Riddell, etc.

Appeal from Jefferson Circuit Court; Chancery Branch; First Division.

SHACKELFORD MILLER, Judge.

From a judgment dismissing the petition, plaintiff appeals—Reversed.

1. Cemeteries—Rights of Lot Owners—Property in Lots.—While the purchaser of a cemetery lot does not acquire a fee simple title to the property, and must use it subject to and in accordance with the reasonable by-laws and rules of the cemetery corporation, he has a property right in the lot, which he is entitled to protect from invasion, whether by a trespasser or the unauthorized and illegal acts of the directors of the corporation.
2. Same—Remedies.—The owner of a cemetery lot may maintain

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either trespass for damages or an injunction to protect his rights from invasion, either against a trespasser or the cemetery corporation.

3. Same—Use of Adjoining Lot—Burial of Animals.—Where lots in a cemetery controlled by a corporation were sold only in accordance with the cemetery's rules and regulations, one of which was that the cemetery was set apart for the burial of the white race, and should be used for cemetery purposes only, a lot owner was entitled to maintain a mandatory injunction to compel the removal of the carcass of a dog, which plaintiff's adjoining lot owner had permitted to be buried in her lot.

4. Same—Nuisance.—The fact that the carcass of the dog was well interred, and was not a physical nuisance, was immaterial.

O'NEAL & O'NEAL for appellant.

(No brief in the record.)

C. B. SEYMOUR for appellees.

SUMMARY.

1. The court will not by injunction require a party to commit a nuisance.

2. The digging up the body of a dog which has been buried two years would be the commission of a nuisance.

3. The burial of a dog on appellee's lot is not a nuisance.

4. The owner of a lot in a cemetery acquires only a license to use the lot for burial purposes. No mere licensee has a cause of action to restrain a nuisance on adjoining land; that right belongs only to holders of estates in land. (Kavanaugh v. Barbour, 131 N. Y., 211; Ellis v. Kansas City R. R. Co., 63 Mo., 131; Greenleaf on Evidence, section 470.)

8. The burial of the pet dog was no desecration.

6. There is no pretense that any inspection will disclose that there has been a burial. There is no injury of which a chancellor can take cognizance. (Cooley on Torts (3d Ed.), p. 713; High on Injunctions, sections 742, 785; Ehrlick v. Comth., 102 S. W., 239.)

7. Appellant has no vested right in the rules of the cemetery. (McGuire v. St. Patrick's Cathedral, 54 Hun (N. Y.), 207.)

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OPINION OF THE COURT BY JUDGE BARKER—Reversing.

The appellant, Henry Hertle, instituted this action in the chancery branch of the Jefferson circuit court for the purpose of securing a mandatory injunction against Cave Hill Cemetery Company, Alice Riddell, W. G. Hansbrough, and Ada Hansbrough, requiring them to remove from the cemetery lot belonging to Hansbrough the body of a dog which was buried therein, as he alleged, in violation of the laws, rules, and regulations governing the cemetery company, and his rights as a lot owner therein. His petition sets forth that Cave Hill Cemetery Company is a corporation created by and under the laws of the State of Kentucky, with power under its charter, among other things, to ordain and put in execution such by-laws, rules, and regulations for its government and the management of its affairs as it may see proper, not contrary to the laws of the Commonwealth of Kentucky or of the United States, and that by its charter it is expressly provided that all lands acquired by the corporation shall be perpetually held and used for the purposes of a "rural cemetery;" that long prior to the actions which are complained of in the petition, and prior to the purchase of lots therein either by the plaintiff or the co-defendants of the cemetery company, the corporation adopted rules and regulations for the government of the cemetery and the management of its affairs, and among others it adopted the following, to-wit: "This cemetery is set apart for the burial of the white race, and shall be used for cemetery purposes only"—which is still in full force and effect. As a succinct statement of

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the facts out of which grew this litigation, we copy the following excerpt from the petition: "He says that, for a valuable consideration paid by him to the defendant corporation, the defendant conveyed and transferred to him on its books, and in accordance with its charter, rules, and regulations, lot No. 104, in section 1 of the cemetery, owned by defendant corporation, and known as and called Cave Hill Cemetery, which is in the county of Jefferson, and State of Kentucky, and he has ever since been and now is the exclusive owner of said lot and has the right to bury the remains of his family and other persons in said lot, and to have his own remains after death buried in said lot; that since the purchase of his said lot as aforesaid he has buried the body of his daughter in said lot, and her body is now buried in said lot, and the residue of said lot is held by him as a place for the burial of the remains of other members of his family, and for the interment of his own remains; that he purchased said lot and caused the remains of his daughter to be buried therein long prior to the wrongs and injuries complained of herein, and relying on the charter, rules, and regulations of the defendant that the lands owned and burial lots sold by it would be used exclusively as a rural cemetery and for the exclusive burial of the remains of white persons, and that said lot and all the other lots owned by said defendant corporation would be used exclusively for said purpose. He states that the defendant Alice Riddell is now and was at the time of the wrongs and injuries hereinafter complained of the owner of lot No. 106, in section 1 of said cemetery, which she purchased and held under and subject to the provisions of the charter, rules, and regulations of said defendant corporation; that the said lot of defend-

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ant Alice Riddell adjoins and binds on the lot of this plaintiff; that the said defendant Alice Riddell, without the knowledge, consent, or approval of this plaintiff, or of any of the other lot owners in said cemetery, to the great shame, humiliation, and distress of this plaintiff and the other members of his family, permitted and authorized her codefendant W. G. Hansbrough and Ada Hansbrough to inter, and they did inter, in her said lot a dog, and the remains of said dog are now buried in said lot; that said wrongs were done without any authority from said cemetery company, and in violation of the rights of this plaintiff as a lot owner in said cemetery. He says that by said wrongful acts of said defendants which were made known and came to the knowledge of many of the citizens of Louisville and Jefferson county he and all the members of his family have been caused and will continue to suffer great mental distress, his said lot will be rendered of no value for any purpose, he will be compelled to remove from his said lot the remains of his daughter now buried therein, and will not be able to use said lot for burial or any other purposes; that the defendants in burying and permitting said dog to be buried on said lot committed and have ever since maintained a nuisance, which said nuisance by reason of its close proximity to the lot of this plaintiff caused to him peculiar and special injury and damage. He states that, as soon as he learned of the wrongs and injuries complained of herein, he demanded of the defendants and each of them that the remains of said dog should be removed from said lot, but the defendants refused to remove same, and notified this plaintiff that they intended to keep the remains of said dog perpetually in said lot. He states that the defendant corporation is willing,

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as he is informed, to abate said nuisance by removing the remains of said dog, but asserts that it cannot do so without the consent of its codefendants, and for that reason refuses to abate said nuisance. He states that the continuance of said nuisance would produce great and irreparable injury to the plaintiff, and its commission has produced great and irreparable injury to the plaintiff; that he has no adequate remedy at law, and the defendants and each of them are doing and suffering to be done all of said acts, all of which are in violation of plaintiff's rights." A general demurrer was filed by the defendants to the petition and sustained by the court; whereupon the appellant (plaintiff below) refused to amend, and his petition was dismissed; and of this ruling he now complains.

The precise question involved here is stated in the briefs of learned counsel to be one of first impression, and their well-known learning and industry is a sufficient guaranty to us that the question has never been adjudicated before. The demurrer admits all of the well-pleaded allegations of the petition, and it therefore only remains to determine (1) what rights appellant as a lot owner in the cemetery possesses; (2) whether or not he can enforce by the processes of the law these rights as against an adjoining lot owner; and (3) whether the action of the defendants are violative of any legal right of the plaintiff. Cave Hill Cemetery is the principal burial place for the white people of the city of Louisville. It may be conceded at the outset that the purchaser of a lot from the defendant corporation does not become its owner in fee simple; that he has in it only the property right of using it for sepulture purposes, subject to the reasonable rules and regulations governing the

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corporation; and it may be said that his property rights more nearly resemble that of an easement than a fee-simple title. But, whatever these rights are, they are property rights, and when violated the owner is as certainly entitled to all the remedies which the law affords, as if he owned a fee simple. The establishment and the maintenance of great cemeteries for the convenience of cities is an absolute necessity. Man naturally desires to provide a suitable place in which to bury his dead, and his reverence and love for his dead demands the establishment of a place where their bodies may repose in peace and dignity; where they will be safe and secure from trespassers, and where he may beautify their graves and mark their last resting place with suitable monuments to preserve their memory from oblivion.

It is a matter of common knowledge that in the principal cemeteries of large cities enormous sums of money are expended in adorning the grounds, in keeping the graves fresh and beautiful, and in erecting monuments upon which to record the virtues of the dead. A lot therefore in a cemetery, by whatever title it is held or denominated, is a valuable property, even when measured in money, and we will now examine some of the authorities bearing upon the subject, in order to ascertain what other jurisdictions and the text-writers have held with reference to the rights of lot owners in cemeteries to invoke the process of the law to restrain or remedy the invasion of their property rights. In the case of Roanoke Cemetery Co. v. Goodwin, 101 Va. 605, 44 S. E. 769, it was held that a purchaser of a lot in a cemetery, while he has the exclusive right to its use for the purpose of sepulture, holds it subject to the reasonable regulations and by-laws of the corporations, and that he

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cannot exercise that absolute dominion over it, or with regard to it, as can the owner in fee simple in regard to his property. In the case of Wright v. Hollywood Cemetery, 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 621, the owners of a lot in the defendant corporation were held entitled to an injunction against the corporation restraining it from preventing them from burying a member of their family upon their lot. In Hollman v. City of Platteville et al., 101 Wis. 94, 76 N. W. 119, 70 Am. St. Rep. 889, the owners of a lot in a public cemetery were held entitled to maintain an action of trespass against the city, which owned the fee-simple title, for invading the lot and removing the dead who were buried there. To the same effect is Bessemer Land & Improvement Co. v. Jenkins, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26. In Gowen v. Bessey, 94 Me. 114, 46 Atl. 792, the owner of a lot in a cemetery, while not owning the fee simple, had such property rights and possession as entitled him to maintain an action of trespass against a wrongdoer. In the case of Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865, 3 L. R. A. (N. S.) 481, it was said that it is well settled that a court of equity will enjoin the owner of land dedicated to cemetery purposes from defacing or meddling with graves on the land, at the suit of any party having deceased relatives or friends buried therein. In the case of Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759, a judgment in damages against the superintendent of a cemetery for wrongfully removing the body of a child of the lot owner was upheld. In the case of Mt. Moriah Cemetery Ass'n v. Commonwealth, 81 Pa. 235, 22 Am. Rep. 748, the Supreme Court of Pennsylvania held that, where a lot was sold to a colored man for burial purposes, the corporation could not

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afterwards change its by-laws and rules so as to exclude him and his family from sepulture therein, and mandamus was upheld against the corporation requiring it to permit the burial of the family of the owners of the lot. The rights of the owners of lots in cemeteries are thus defined in 6 Cyc. title "Cemeteries," section 8, p. 720: "Equity has jurisdiction to enjoin an unwarrantable disturbance or interference with a burial ground or the graves therein. An action of trespass quare clausum fregit may be maintained for breaking and entering a burial lot. One who is in the rightful possession of a cemetery lot, or who holds title to the usufructuary interest therein, may maintain an action against one who wrongfully trespasses upon it." In the case of Burke v. Wall, 29 Am. Rep. 316, 29 La. Ann. 38, it was held that where the plat of the cemetery at the time the owner purchased his lot showed an avenue or walkway leading up to the lot, and which was an easement subservient thereto, the owner of the lot is entitled to an injunction restraining the closing or discontinuing of the easement by the cemetery company. In Beatty, etc., v. Kurtz et al., 2 Pet. (U. S.) 566, 7 L. Ed. 521, it was held by the Supreme Court of the United States that the owners of burial lots, to which they had title by prescription, were entitled to the equitable remedy of injunction against the owners of the fee in the land to restrain them from removing the ashes of the dead. The court, in its opinion, speaking through Mr. Justice Story, said: "The next question is as to the competency of the plaintiffs to maintain the present suit. If they are proved to be the regularly appointed committee of a voluntary society of Lutherans in actual possession of the premises, and acting by their direction to prevent a disturbance of that

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possession, under circumstances like those stated in the bill, we do not perceive any serious objection to their right to maintain the suit. It is a case where no action at law, even if one could be brought by the voluntary society (which it would be difficult to maintain), would afford an adequate and complete remedy. This is not the case of mere private trespass; but a public nuisance, going to the irreparable injury to the Georgetown congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement is to be taken from them, the sepulchers of the dead are to be violated; the feelings of religion, and the sentiments of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinaary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery, operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living." In People v. St. Patrick's Cathedral, 21 Hun. (N. Y.) 184. it was held that one who purchases a lot from a distinctively Roman Catholic cemetery takes it with the tacit understanding either that he is a Roman Catholic, and, as such, eligible to burial, or at least that he applies on behalf of those who are in communion with the church. And in Dwenger v. Geary, 113 Ind. 106, 14 N. E. 903, it was held that where land was conveyed as a burial place for members of the Catholic Church, and is taken in charge by officers of that denomination and consecrated according to its laws,

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a lot owner has no right to inter therein a person not recognized by the church authorities as a Catholic. In the case of McGough v. Lancaster Burial Board, 21 Q. B. Div. 323, it was held that a lot owner had no right to erect a glass shade over the grave on his lot, which was contrary to the rules of the board. In the case of Clark v. Rahway Cemetery et al., 69 N. J. Eq. 636, 61 Atl. 261, in the Court of Chancery of New Jersey, it was held that a lot owner in a cemetery where the ground was dedicated for burial purposes only could maintain an injunction against the trustees, requiring them to keep the grounds in good order and repair, and to maintain the whole as a cemetery. In the opinion it is said: "Now, what is the object of this cemetery company? That is stated in its certificate: "The object and purpose of the corporation is to maintain and use the property acquired from the church and any property it may hereafter acquire * * * for cemetery purposes.' What are these purposes? Manifestly the decent care of the departed. The company itself is not only to use the property for burial purposes, but also to maintain it for those purposes. * * * It would seem plain that under the joint operation of the certificate of incorporation, of the by-laws, and of the deed itself the purchaser is not the isolated owner of a fee-simple absolute, of a lot over which he has entire control as such, but a person who has acquired a limited interest in a lot which is part of one connected whole; that whole being conducted, maintained, and managed by trustees for the benefit of himself and those similarly situated. His interest is in some degree that of a beneficiary of a trust, and I cannot imagine why he should not have the right to complain if that is being violated to his prejudice. Here the direct tendency of

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the acts complained of is to imperil the lots remaining undisposed of, to depreciate the value of the cemetery lots as a whole, to prevent needed improvements, and to render access to complainant's lot more difficult."

From the foregoing authorities, we deduce these principles, which we think are sound: (1) That while a purchaser of a lot in a cemetery company such as the one at bar does not acquire the fee-simple title to the property, and must use it subject to and in accordance with the reasonable by-laws and rules of the managers of the company, yet he has a property right in his lot which the law recognizes and protects from invasion, whether it be by a mere trespasser or from the unauthorized and illegal acts of the directors of the corporation itself. (2) That the lot owner's remedy is commensurate with his rights, and he may maintain either trespass for damages or injunction, to enforce and uphold his rights whenever those remedies may be necessary, and this either against the trespasser or the company itself. The question, then, recurs: Did the act of the adjoining lot owners in burying on their lot the body of their dead dog violate the property rights of the plaintiff? And, if so, is the wrong such an one as equity will remedy by a mandatory injunction? The answers to these questions must depend upon the contracts which arose between the parties when the lots were purchased. Into the contract of purchase of a lot in a cemetery must be read the charter and by-laws of the company, and neither the owner nor the corporation can violate the fundamental purpose for which the corporation was organized and the property dedicated. One who purchases a lot in a Catholic cemetery may not afterwards violate the rule of the church by giving sepulture to a member of the Masonic order, although the

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contract of purchase is silent on the subject. People v. St. Patrick's Cathedral; Dwenger v. Geary, supra. Nor may a cemetery company sell a lot to a negro and afterwards adopt a by-law which forbids its use for burial purposes to the negro race. Mt. Moriah Cemetery Company v. Commonwealth, supra. When, therefore, one contemplates the purchase of a lot upon which to bury his family, in order that he may certainly obtain what he desires, he must look to the charter and by-laws of the corporation, and having done this, they become a part of his contract of purchase. When the plaintiff and the defendants purchased the lots they now own in Cave Hill Cemetery, its charter dedicated it as a cemetery, and its by-laws contained the guaranty that "this cemetery is set apart for the burial of the white race, and shall be used for cemetery purposes only." With these provisions in their contracts, with what grace may the defendants demand the right to turn their lot into a place for the burial of dogs? Or why shall the plaintiff be not heard to complain of this gross violation of the charter and by-laws of the cemetery company? The appellees and the chancellor answer that it was a small dog, that it was well buried, and its presence under these conditions does not create a nuisance. If the question be whether its burial creates a physical nuisance, this view may be correct. But is there not much more involved in the question than a mere physical nuisance? A member of the negro race well buried is, from the standpoint of physical nuisance, no more so than the body of one of the Caucasian race; yet no one will deny that, if the privilege of burial in it were extended to the negro race, the value of Cave Hill as a cemetery for white people would be at once entirely destroyed. A lot which is now

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worth in money as much as $500 would not, after such a change in the by-laws, be worth $50. Property which in the aggregate may now be worth millions, would then be rendered practically worthless. It does not aid the question to say that this is an unreasoning prejudice. For the purposes of the argument, this may be admitted to be true. It is none the less true, however, that the money value of this cemetery property is based upon the confidence of the white citizens of Louisville that their prejudices in this regard will be safeguarded both by the corporation and the law. If this is true in regard to members of another race, is it not true to a greater degree in regard to the bodies of the lower animals? If the body of a dog may find sepulture on the lot of its owner in Cave Hill Cemetery, why might not the owner of a horse or bull, or donkey, also bury his favorite on his lot therein, if his fancy should take this freakish direction? Where would, or could, the line be drawn, if not at the body of a dog? We believe that the average man would consider it an outrage on his rights as a lot owner in a cemetery if the owner of the adjoining lot should inter the carcass of a dog beside the lot which holds the graves of his family. It would be useless to tell him that, when the bodies were resolved back into their original elements, chemically there is no difference between them. We do not reason about the dignity of our dead either according to the laws of logic or of chemistry. Sorrow, bending over the graves of her loved ones, smiles through her tears and accepts the assurance of Faith that they are not dead, but sleeping. It is for this reason that we beautify the grounds in which they repose, guard their graves from vandalism, and protect their dignity from desecration. This may be only senti-

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mentality; but, if these sentiments are outraged, our pain is none the less real. The burial place of the dead has among all nations and in all times been deemed sacred, and our Anglo-Saxon forefathers called it "God's Acre." It is protected by stringent laws from violation, and its willful desecration is universally regarded as exceptionally wicked. Man does not regard the last resting place of his dead as simply a place where they may be thrust from sight and forgotten. To him their ashes are sacred; and the memory of their virtues constitutes a foundation both for inspiration and courage. It was in this spirit that a great patriot, when our country was in direst peril, appealed to the mystic chords of memory stretching from every battle field and patriot's grave to every living heart and hearthstone in the land to swell the chorus of the Union when touched by the better angels of our nature. The sentiments and prejudices of man are a part of him. He does not often control them. As a rule they control him. He has a right to protect his lawful sentiments and prejudices from violation or outrage by contracts based upon legal consideration, and, when they are thus safeguarded, no reason is perceived why these contracts may not be enforced as any other contracts may be.

When the appellant purchased his lot in Cave Hill Cemetery by a large outlay of money, it was to secure a place of sepulture for himself and family in a cemetery dedicated to the burial of white people only, and, while some may criticise this spirit of exclusiveness, surely none can successfully deny his right to that for which he paid. On the other hand, the adjoining lot owners purchased their lot subject to the charter and by-laws of the cemetery company, and they have no right to put it to any use which violates the charter

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and by-laws of the cemetery company. Each is entitled to what he purchased—no more, no less. The appellant not only has the right to the actual use of his lot for the purpose for which it was sold to him, but he has also in common with all the other lot owners the right to have the cemetery maintained as a whole for the purposes for which it was dedicated, and is entitled to an injunction against the trustees of the corporation and the adjoining lot owners to prevent these rights from being violated. Clark v. Rahway Cemetery, 69 N. J. Eq. 636, 61 Atl. 261; Burk v. Wall, 29 La. Ann. 38, 29 Am. Rep. 316; Beatty v. Kurtz, 2 Peters (U. S.) 566, 7 L. Ed. 521.

For these reasons, the judgment is reversed, with directions to overrule the demurrer to the petition, and for further procedure consistent with this opinion.

Petition for rehearing by appellant overruled.

CASE 64.—ACTION BY O. B. INGRAM AGAINST THE CINCINNATI, FLEMINGSBURG & SOUTHEASTERN R. R. CO. AND OTHERS TO HAVE SAID RAILROAD COMPANY PLACED IN THE HANDS OF A RECEIVER.—December 19.

Ingram v. Cincinnati, F. & S. E. R. R. Co.

Appeal from Fleming Circuit Court.

JAMES P. HARBESON, Circuit Judge.

Motion by plaintiff for receiver overruled and he appeals—Motion to docket case in Appellate Court overruled.

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1 Appeal — Affirmance — Motion — Grounds — Delay.—Under Code Prac., 1906, section 759, providing that, if an appeal with supersedeas is taken for delay merely, the appellee may at any time move the court to affirm the judgment as a delay case, the court can not entertain a motion to affirm as a delay case until the case is regularly on the docket and before the court.

2. Same—Calendars—Preferring Case.—The court of appeals will not entertain a motion to docket an appeal and advance a case for decision before it has been regularly placed upon the docket as provided by Code Practice, 1906, unless both parties consent thereto; and section 298, providing that the order of a court appointing or refusing to appoint a receiver shall be deemed a final order for the purpose of an appeal, does not put appeals taken under it on a different footing from other appeals.

3. Same—Elections.—Under the statute regulating appeals in election cases, providing that the transcript must be filed within 30 days after final judgment in the circuit court, and that in the court of appeals the case shall be heard and determined as speedily as possible and shall have precedence over all other cases, election cases may be heard and determined at the time at which they are filed.

J. A. SCOTT, ELWOOD HAMILTON and O. A. BRIGHT for appellant.

POINTS AND AUTHORITIES.

1. Receiver's duties. (Alderson on Receivers, section 2, p. 3; section 4, p. 7; section 515, p. 701.)

2. The duty of the court in the appointment of a receiver. (Columbia Finance & Trust Co. v. Morgan, etc., 19 Ky. Law Rep., 1761; Reban v. Furham, 21 Ky. Law Rep., 17; Ind. Mut. Deposit Co.'s Receiver v. Taylor, 26 Ky. Law Rep., 802.)

3. The sale of the railroad. (Ky. tSats., section 561; Economy Bldg. & Loan Assn. v. Paris Ice Mfg. Co., 24 Ky. Law Rep., 107; Thompson on Corporations, section 6688; I. C. R. R. Co. v. Sheegogg's Admr., 31 Ky. Law Rep., 691; Campden Interstate Ry. Co. v. Lee, etc., 27 Ky. Law Rep., 75; Thompson on Corporations, section 371; 6 Am. & Eng. Ency. of Law, 818; 1$ Cyc., 306-414; Ball v. Maysville & Big Sandy R. R. Co., 19 Ky. Law Rep., 1540; Thompson on Corporations, section 372; Morawetz on Private Corporations, sections 790, 791; L. & N. R. R. Co. v Studle, 112 Ky., 494; Graham v. Graham, 113 Ky., 745.)

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B. S. GRANNIS and JOHN P. McCARTNEY for appellee.

POINTS AND AUTHORITIES.

The appellant is not entitled to a receiver under section 299 of the Civil Code, for the reason that he has no mortgage debt; nor is he entitled to a receiver under section 298 of the Civil Code, (Civil Code, sections 299, 398; Constitution, sections 202-203; Roush v. Vanceburg, etc., Co., 85 S. W. 735-738, 27 Ky Law Rep. 542; Bailey and wife, v. Southern R. R. Co. in Ky., 112 Ky., 430-431; M. & B. S. R. R. Co. v. McCabe, 112 Ky., 861; M. & B. S. R. R. Co. v. Sweiz, 116 Ky., 253; Slater v. Sherman, 5 Bush, 206; Anglin v. Conley, 71 S. W., 926; Ky. Racing & Breeding Assn. v. Galbreath, etc., 77 S. W., 371; Tolle, etc., v. Owensboro, etc., R. R. Co., 111 Ky., 496-499; Ky. Stats., sections 560 and 814; Ky. Stats., section 1907; Leavel v. Poore, 91 Ky., 321.)

OPINION OF THE COURT BY JUDGE HOBSON—Overruling motion.

O. B. Ingram on November 6, 1907, recovered a judgment for $4,000 against the Covington, Flemingsburg & Ashland Railroad Company. Execution was issued on the judgment and returned "No property found." On November 11, 1907, he filed this suit against the Covington, Flemingsburg & Ashland Railroad Company, the Cincinnati, Flemingsburg & Southeastern Railroad Company, and the Columbia Finance & Trust Company, in which he alleged that the first company had sold out to the second its railway and property, and that as a part of the price the purchaser agreed to pay to him any sum which he might recover in the action which he had then instituted, and in which he recovered the judgment for $4,000; that the purchaser had made a mortgage to the Columbia Finance & Trust Company to secure bonds to the amount of $30,000; that the purchaser had taken possession of the road, but had ceased to operate about 12 miles of it; that in ceasing to operate

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the road it had materially impaired its earning power; that the road was depreciating in value; that he had a lien upon the property for the payment of the judgment; and that his security was being depreciated by the acts of the purchaser. He prayed that the road be placed in the hands of a receiver. On November 30, 1907, he entered a motion before the circuit judge for the appointment of a receiver. The court overruled the motion, and he prayed an appeal to this court, which was granted. On December 10th he filed a transcript of the record in this court, and entered a motion that the case be docketed, advanced, and set for hearing at this term. Appellees object to the motion on the ground that the court has no power to hear the case until it is regularly docketed as provided by the Code.

Section 759, Code Prac. 1906, provides that if an appeal with supersedeas is taken for delay merely, the appellee may at any time move the court to affirm the judgment as a delay case. Under this section it has been held that the court cannot entertain a motion to affirm as a delay case until the case is regularly on the docket and before the court. L. & N. R. R. Co. v. Schmidt, 104 Ky. 179, 19 Ky. Law Rep. 666, 46 S. W. 688; Wyatt v. Ryan, 65 S. W. 129, 23 Ky. Law Rep. 1457; Hamilton v. Ky. Title Co., 79 S. W. 1182, 25 Ky. Law Rep. 1575. The same rule has been uniformly followed by the court where motions have been made to docket an appeal and advance the case for decision before it had been regularly placed upon the docket as provided by the Code, unless both parties consented to the docketing and advancing of the case. Meacham v. Dem. Executive Com., 115 Ky. 2461, 71 S. W. 447, 24 Ky. Law Rep. 1340; Sweeney v. Coulter, 57 S. W. 254, 470, 22 Ky.

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Law Rep. 339. Section 298, Code Prac. 1906, provides: "The order of a court, or of the judge thereof, appointing or refusing to appoint a receiver, shall be deemed a final order for the purpose of an appeal to the Court of Appeals." There is nothing in this section, however, to put appeals taken under it on a different footing from other appeals.

The statute regulating appeals in election cases provides that the transcript must be filed within 30 days after final judgment in the circuit court, and that in this court the case shall be heard and determined as speedily as possible and shall have precedence over all other cases. Under this provision it has been held that election cases may be heard and determined at the time at which they are filed. But, there being no such provision as to appeals in suits for the appointment of a receiver, they cannot be given precedence over other cases. Counsel insist that, while this may be true as to appeals from final judgments in actions like this, appeals from orders made on motions should stand differently. The difficulty with this is that the Legislature has not so provided. It has simply given the right of appeal from orders made on motions, but has left the appeal to be regulated as other appeals.

The motion to docket the case is therefore overruled.

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CASE 65.—ACTION BY C. C. CURRY AGAINST THE ILLINOIS CENTRAL RAILROAD CO. AND ANOTHER FOR DAMAGES TO STOCK SHIPPED ON SAID RAILROAD.—December 19.

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Illinois Cent. R. R. Co. v. Curry

Appeal from Clark Circuit Court.

J. M. BENTON, Circuit Judge.

Judgment for plaintiff and defendant railroad company appeals—Affirmed.

1. Carriers—Live Stock—Connecting Carriers—Liability.—Where live stock is shipped to a point within or without the State, the contract of shipment made with the initial carrier is binding on all connecting carriers who receive the live stock.
2. Same—Actions—Venue.—Where live stock is injured by the negligence of any of the carriers having it in charge between the points of reception and destination, an action may be brought against the initial carrier in the county where the contract of shipment was made.
3. Same—Parties.—In an action against an initial carrier for injuries to live stock, all the connecting carriers against whom it is sought to recover damages may be made parties defendant; and, if brought before the court by process as provided by Civil Code Prac., section 51, a judgment may be given against any one or all of them that the evidence shows to have committed the injuries.
4. Same—Liability of Connecting Carriers.—In an action against one or several carriers for injuries to live stock, none of them will be responsible for damages occurring beyond the end of the lines controlled by them in the absence of a special contract.
5. Same—Trial—Separate Verdicts—Instructions.—In an action against several carriers for injuries to live stock, in the absence of a special contract extending the liability beyond the end of their respective lines, the jury should be instructed

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to find a separate verdict against each carrier for the damages that occurred on its line.

6. Same—Question for Jury.—In an action against two connecting carriers for injury to live stock, plaintiff alleged that an oral contract of shipment was made with the initial carrier; that there were mutual traffic arrangements between the two roads, and that they were connecting lines; that the contract was made with the initial carrier acting on behalf of the other road; that the stock was shipped by the initial carrier, and delivered to the connecting carrier which agreed to ship it to its destination. The written contract under which defendant connecting carrier alleged that the shipment was made was substantially the same as the parol contract, except in respect to the limitation of each carrier's liability to injuries occurring on its line, and the evidence showed that the stock was received by the connecting road and carried to its destination. Held, That the refusal of the trial court to instruct peremptorily for defendant connecting carrier was not error.

7. Pleading—Variance.—A variance exists when the evidence does not sustain the pleadings on which a recovery is sought or a defense rested.

8. Carriers—Injuries to Live Stock—Action—Pleading—Variance. —Civil Code Prac., section 129, provides that no variance between pleadings and proof is material which does not mislead a party to his prejudice. Section 131 provides that, if the allegation to which the proof is directed be unproved in its general scope and meaning, it is not to be deemed a case of variance, but a failure of proof. Held, That where, in an action against connecting carriers for injury to live stock, plaintiff alleged that a verbal contract of shipment was first made and that a written contract was subsequently signed, and proved that a verbal contract was made, and defendants relied on a written contract and proved that one was entered into, there was no variance or failure of proof.

9. Same—Failure to Feed and Water.—Under Revised Stats. U. S., section 4386 (U. S. Comp. St., 1901, p. 2995), providing that no railroad company shall confine live stock in cars for a longer period than 28 hours without unloading for rest, water and feed, it is the duty of a railroad to be reasonably well prepared to care for stock at the places where it is unloaded for rest, water, and feed.

10. Same—Measure of Damages—Instructions.—Where in an action against a railroad for injuries to live stock shipped

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under a contract, by which defendant was only liable for damages between the towns of L. and M., though the destination of the stock was A., some 200 miles beyond M., the evidence showed that the injuries were sustained between L. and M., the court properly instructed that the measure of damages was to be based on the condition of the stock on arrival at A.

TRABUE, DOOLAN & COX and J. SMITH HAYS for appellant.

CLASSIFICATION OF QUESTIONS AND AUTHORITIES.

1. The petition as amended did not by direct averment, or proper inference from the language used, allege that appellant had covenanted, in Clark county, Kentucky, to carry appellee's shipment. No cause of action ex contractu could be stated without such averment. (Louisville, etc., Ry. Co. v. Bennett, etc., 25 Ky. Law Rep. 834, 76 S. W. 408; Chicago & E. I. R. R. Co. v. Chestnut Bros., 28 Ky. Law Rep. 404, 89 S. W. 298; L. & N. R. R. Co. v. Wathen, 22 Ky. Law Rep. 82, 49 S. W. 145; Clark on Contracts, p. 511; Ency. of Pl. & Prac., vol. 15, pp. 524-582; Miles v. Miller, etc., 12 Bush (75 Ky.), 134; Moxley's Admr. v. Moxley, 2 Met. (59 Ky.), 309.)

2. The petition alleges a parol contract of shipment which was denied; the answers allege a written contract of shipment which appellee denied. The evidence of appellee showed that no parol contract was made and non-suit being asked should have been ordered. (Brown v. Warner, 2 J. J. M. (25 Ky.), 37; Rudd v. Thomas, 1 J. J. M. (24 Ky.), 299; Howard v. Chiles, 8 B. M. (47 Ky.), 377; Gossom v. Badgett, 6 Bush (69 Ky.), 97; Newton's Executor v. Field, 98 Ky., 186; L. & N. R. R. Co. v. Cooper, 19 Ky. Law Rep. 1152, 42 S. W. 1134; Richmond, N., I. & B. R. R. Co. v. Richardson, 19 Ky. Law Rep. 1488, 43 S. W. 465, 23 Ky. Law Rep. 2234, ** S. W. 1035; McCain v. L. & N. R. R. Co., 13 Ky. Law Rep. 809, 18 S. W. 537; Thomas v. L. & N. R. R. Co., 18 Ky. Law Rep. 164, 35 S. W. 910; Greer v. L. & N. R. R. Co., 94 Ky., 169.)

3. By independent covenants two independent carriers contract to transport a shipment, each over its own line and not beyond it, both lines forming part of the route to destination, the shipper will be required to sue the carriers separately on an alleged breach of contracts; suing both carriers in one action is a misjoinder. The facts being alleged in the answers and no evidence on the trial to the contrary being introduced, one of the defendants having contracted in a different county, non-suit should be ordered; first, because there is not joint obligation or liability;

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second, because of the misjoinder; third, because of no jurisdiction over the carrier contracting in a different county. (Richmond, N., I. & B. R. R. Co. v. Richardson, 19 Ky. Law Rep. 1488, 43 S. W. 465, 23 Ky. Law Rep. 2234, 66 S. W. 1034; L. & N. R. R. Co. v. Chestnut & Bro., 72 S. W. 351, 24 Ky. Law Rep. 1864; Harris v. Campbell, 4 Dana (34 Ky.), 586; Ency. Pl. & Pr., vol. 15, p. 547; L. & N. R. R. Co. v. Cooper, 21 Ky. Law Rep. 1664, 56 S. W. 408; Owen & McKinney v. L. & N. R. R. Co., 87 Ky., 626; Bryan v. Memphis, etc., R. R. Co., 11 Bush (74 Ky.), 597; Ireland v. Mobile & O. R. R. Co., etc., 105 Ky., 400; Pittsburg, C., C. & St. L. Ry. Co. v. Iers, etc., 68 S. W. 419, 24 Ky. Law Rep. 356; Nashville etc., R. R. Co. v. Carrico, 95 Ky., 489.)

4. The court erred in refusing the instruction asked and in giving the instruction to the jury on the measure of damages; and erroneously instructed the jury to allow damages to appellee, if it believed appellant failed to be reasonably well prepared in the way of places for feeding and watering the stock. (Sutherland on Damages, section 917; C., N. O. & T. P. Ry. Co. v. Pendleton & Hudson, 29 Ky. Law Rep. 721, 96 S. W. 434; C., N. O. & T. P. Ry. Co. v. Logan & Hundley, 29 Ky. Law Rep. 1123, 96 S. W. 910.)

5. The instructions complained of disregarded valid and plain provisions in the contract of shipment and imposed upon the appellant duties and risks devolved by the contract upon the appellee. (I. C. R. R. Co. v. Holt, 29 Ky. Law Rep. 135, 92 S. W. 540; L., C. & L. R. R. Co. v. Hedges, 9 Bush (72 Ky.), 645; L. & N. R. R. Co. v. Wathen, 22 Ky. Law Rep. 82, 49 S. W. 185; L. & N. R. R. Co. v. Harned, 23 Ky. Law Rep. 1653, 66 S. W. 25; C., N. O. & T. P. Ry. Co. v. Greening, decided March 19, 1907.)

6. A claim based on the 28-hour law sounds in tort and not in contract, and the I. C. R. R. Co. can not be joined with the C. & O. Ry. Co. in a suit of that character and can not in fact be sued in Clark county upon such a claim, when it objects, as in this case, to both jurisdiction and joinder. (I. C. R. R. Co. v. Eblen, 24 Ky. Law Rep. 1609, 71 S. W. 919; C., N. O. & T. P. Ry. Co. v. Gregg, 25 Ky. Law Rep. 2329, 80 S. W. 512.)

7. The verdict of $700.00 against appellant, under all the facts and circumstances in the case, is excessive and should be set aside on that ground. Incompetent evidence was admitted over appellant's objections. (I. C. R. R. Co. v. Radford, 23 Ky. Law Rep. 886, 64 S. W. 511.)

BECKNER & JOUETT for appellee.

It must be apparent to the court that the contention of appellee

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that his horses and mules were shipped under an oral contract is sustained by the opinions of this court in Caldwell v. C., N. O. & T. P. Ry. Co., 21 Ky. Law Rep., 397, and L. & N. R. R. Co. v. Cooper, 21 Ky. Law Rep., 1644. That it was a contract for through shipment is abundantly established by the evidence. As we have shown, it was made by the C. & O. R. R. Co. at Winchester for and on behalf of itself and appellant, and the contract there made was ratified by the Ill. Cent. R. R. Co. in accepting the stock at Louisville without other contract, as Caudill proves, and transporting it on to Memphis. In P. C., etc., R. R. Co. v. Viers, 24 Ky. Law Rep., 361, the court said: "In this case the L. & N. Co. made the contract for shipment. It contracted on behalf of itself and connecting carriers, without stipulating what carriers should complete the transportation to the point of destination. It limited its own liability to such damages as should occur upon its own line. It also undertook to further limit its liability, and the contract provides, that such limitation should inure to the benefit of connecting carriers. Although it is not shown that the P., C., C. & St. Louis Co. had knowledge of these provisions, it must be charged with knowledge that the L. & N. Co. received the cattle under some contract. Though, so far as the record shows, it did not know the terms of that contract, it should have ascertained them, or it could have limited its own liability by the terms of the receipt, which it gave for the cattle to the intermediate carrier, the Louisville Bridge Co., which received them from the L. & N. Co.'s terminus, and delivered them to the P., C. C., & St. L. Co. Having received the cattle without any such limitation, we are of opinion that in view of the authorities, it must be assumed to have accepted them under the terms of the original contract. The ratification was the ratification of the contract made in Hardin county. It bound the shipper, as if it had been signed in Hardin county by him and by the connecting carrier. When ratified, it bound the connecting carrier as if it had been there signed by it or its agent, and it became a contract made in Hardin county between appellees and the P., C., C. & St. L. Ry. Co." It will be noted that the court in this opinion says the L. & N. R. R. Co. "contracted on behalf of itself and connecting carriers," just as appellee in this action alleged in his petition that the C. & O. Ry. Co. "for and on behalf of itself and its co-defendant, the Ill. Cent. R. R. Co.," made the contract therein alleged to transport his stock by through freight over the quickest route to Arcadia in Louisiana. If then there was sufficient evidence to justify the jury in believing that the C. & O. Ry. Co. for and on behalf of itself and appellant made a contract to

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transport appellee's stock to Arcadia, Louisiana, and appellant received the stock at Louisville under this contract, and through its negligence the stock was injured, as is so abundantly proven, to the extent of thirteen hundred dollars, there can be no reversal either for want of jurisdiction, or because the verdict was excessive. We think the record in this case will sustain all the rulings of the court and abundantly justify the finding of the jury.

AUTHORITIES CITED.

Initial carrier agent of connecting line. (P., C., C. & St. L. R. R. Co. v. Viers, 24 Ky. Law Rep., 356.)

Venue. (Civil Code, section 73; L. & N. R. R. Co. v. Carrico, 95 Ky., 489.)

Bill of lading not binding. (Caldwell v. C., N. O. & T. P. Ry. Co., 21 Ky. Law Rep., 397; L. & N. R. R. Co. v. Cooper, 21 Ky. Law Rep., 1644.)

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

In this action appellee recovered a judgment against the Chesapeake & Ohio Railway Company and the Illinois Central Railroad Company for damages growing out of injury to stock shipped by him from Winchester, Ky. to Arcadia, La. There was a separate verdict against each of the companies; but, the recovery against the Chesapeake & Ohio Railway being less than $200, no appeal was prosecuted by it. The contract for the shipment of the stock was made with the agent of the Chesapeake & Ohio Railway Company in Clarke county, Ky. It is averred in the petition, and testified to by appellee, that this contract was in parol, but that after the stock was loaded on the cars a written contract in the form in use by railroads generally was presented to him by the agent, and signed. Both railroad companies denied that any parol contract for shipment was entered into, and relied upon the written contract, and all of the

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stipulations contained therein, several of which they depended upon to relieve them from liability.

Numerous motions relating to the jurisdiction of the court, the misjoinder of actions, and other alleged defects in the pleadings were made, but we do not deem it necessary to consider any of them except the questions raised as to the jurisdiction of the court and the misjoinder of the causes of action. It is the settled law in this State, as declared by this court, that, where live stock or other freight is shipped from a point in this State to any other point within or without the State, the contract of shipment made with the initial carrier, whether it be verbal or written, is binding upon all connecting carriers, whether immediate or remote, who receive the live stock or freight. And, if the property is injured by the negligence of any of the carriers having it in charge between the point of reception and destination, an action may be brought in the county where the contract, verbal or written, was made against the initial carrier, and in such action all of the connecting carriers against whom it is sought to recover damages may be made parties defendant, and, if before the court by process executed in the manner provided in section 51 of the Civil Code of Practice, a judgment may be given against any one or all of them that the evidence shows to have committed the injuries complained of. Each connecting carrier to the point of destination receiving the freight will be considered as having constituted and appointed the initial carrier its agent for the purpose of entering into the contract of shipment, and will be liable upon the contract made with the initial carrier the same as if it had been made directly with it. P. C. C. & St. L. Ry. Co. v. Viers, 113 Ky. 526, 24 Ky. Law Rep.

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356, 68 S. W. 469; Nashville R. Co. v. Carico. 95 Ky. 489, 26 S. W. 177, 16 Ky. Law Rep. 66; L. & N. R. Co. v. Chestnut, 72 S. W. 351, 24 Ky. Law Rep. 1846. But in an action against one or several carriers neither of them, in the absence of a special contract, will be responsible for injury or damage occurring beyond the end of the lines controlled and operated by them. Ireland v. Mobile & Ohio R. Co., 105 Ky. 400, 20 Ky. Law Rep. 1586, 49 S. W. 188, 453; L. & N. R. Co. v. Chestnut, 72 S. W. 351, 24 Ky. Law Rep. 1846; C., N. O. & T. P. Ry. Co. v. Greening, 100 S. W. 825, 30 Ky. Law Rep. 1180. And in the trial of a case against several carriers, in the absence of a special contract extending the liability beyond the end of their respective lines, the jury should be instructed to find a separate verdict against each carrier for the injury or damage that occurred upon its line.

It is earnestly urged that as the contract declared on was alleged to have been in parol, and appellee in his evidence attempted to establish this fact, the peremptory instruction asked by the Illinois Central Railroad Company should have been given, as under the parol contract set up the Chesapeake & Ohio Railway Company was liable for all damages that occurred to the stock during the entire course of their transportation. The petition charged that there were mutual traffic arrangements between the Chesapeake & Ohio Railway Company and the Illinois Central Railway Company, and that they were connecting lines one with the other, and that the contract was made with the Chesapeake & Ohio Railway Company acting for and on behalf of its codefendant, the Illinois Central Railway Company, and that the stock were shipped from Winchester to Louisville over the Chesapeake & Ohio Railway, and there delivered to

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its connecting carrier, the Illinois Central Railroad Company, and that it agreed to ship them to Arcadia, via Illinois Central Railroad, and the evidence established that, when the car in which the stock were transported arrived at Louisville over the Chesapeake & Ohio Railway, it was there delivered to the Illinois Central Railroad, and carried to its destination.

The appellee could have sued on the written contract, and, if he had done so, no question under the evidence could have been raised about the liability of the connecting carrier who received the stock under the written contract, or as to the jurisdiction of the Clark circuit court; nor does the fact that appellee declared on a parol contract defeat the jurisdiction of that court or affect his right to recover against appellant. Whether there was or not a traffic arrangement between the roads that authorized the Chesapeake & Ohio Railway Company to receive the stock for transportation to Arcadia, and to send them a part of the way over the lines of the Illinois Central Railroad, it is a fact that the Illinois Central Railroad did receive the stock from the Chesapeake & Ohio Railway Company and carry them part, if not all, the way to Arcadia, and, having received them, the Clarke circuit court had jurisdiction of it. P. C. C. & St. L. R. Co. v. Viers, supra. Under the pleadings and evidence of appellee, the contract, although in parol, provided for the shipment of the stock from Winchester to Arcadia by the Chesapeake & Ohio Railway Company and its connecting carrier, the Illinois Central Railroad Company. The written contract also stipulated that the stock should be shipped from Winchester to Arcadia by these two carriers. So that, except in respect to the limitation of each

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carrier's liability to injuries that occurred on its line, there was no substantial difference between the parol contract relied on by plaintiff and the written contract set up by the defendant. And, when the trial judge came to instruct the jury, he did not point out the character of contract under which the stock were received, but treated the written contract as the real one between the parties, and informed the jury that the Chesapeake & Ohio Railway Company was only liable for injuries sustained by the stock between Winchester and its terminal at Louisville, Ky., where they were delivered to the Illinois Central Railroad Company; and that the liability of the Illinois Central Railroad Company terminated at Memphis, Tenn., the end of its line.

Nor was there either a variance or a failure of proof within the meaning of sections 129 and 131 of the Civil Code of Practice. Under section 129 a variance exists when the proof introduced by a party in support of his cause of action differs from the acts constituting the cause stated in his pleadings. For instance, if a person should charge that he was injured by a defective air brake on a railroad train, and his evidence established the fact that he was injured by a defective coupler, there would be a variance; and so, if an action was brought to recover the amount of a promissory note alleged to have been executed by the defendant, and the proof developed the fact that he had made a check in place of a note, there would be a variance. A variance exists when the evidence does not sustain the pleadings upon which a recovery is sought or a defense rested. Tyler v. Coleman, 97 S. W. 373, 29 Ky. Law Rep. 1270; Gaines v. Deposit Bank of Frankfort, 39 S. W. 438, 19 Ky. Law Rep. 171; Henderson Brewing Company

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v. Folden, 76 S. W. 520, 25 Ky. Law Rep. 969; Simpson v. Carr, 76 S. W. 346, 25 Ky. Law Rep. 849. There is a failure of proof when, in the language of the Code, "the allegation of a claim or defense to which the proof is directed be unproved, not in some particular or particulars only, but in its general scope and meaning;" as, for instance, if the pleader wholly fails to sustain the cause of action or defense relied on. To illustrate, if it was sought to recover the value of a horse alleged to have been sold by the plaintiff to the defendant, and the plaintiff's proof failed to show that the horse was sold, so where a covenant is sued upon and there are conditions precedent to be performed by the plaintiff, which he alleged he did perform, but wholly fails to prove them. Newman's Pleading & Practice, p. 726. But in the case before us the plaintiff declared on a verbal contract and proved that a verbal contract had been entered into. The defendant relied on a written contract, and proved that a written contract was entered into. Hence it was simply a question of whether the contract was verbal or written—each of the parties introducing evidence to support their respective contentions. If this constituted a variance or a failure of proof, then in every case where an issue was made, although each party supported his side of it, there would be either a variance or a failure of proof. The fact that the plaintiff's proof may not be as strong or convincing as the defendant's does not affect the question. If he introduces any evidence tending to support the allegations of his pleading, he is entitled to go to the jury upon the case as he has made it out.

Among the charges of negligence alleged in the petition was the one that the stock were confined in

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the car for a longer period of time than 28 consecutive hours, in violation of section 4386 of the United States Statutes (U. S. Comp. St. 1901, p. 2995), and that, when unloaded, they were not properly fed and cared for. There was evidence tending to establish that on two occasions the statute was violated, and also that, when the stock were unloaded for the purpose of resting, feeding, and watering, the company was not prepared to take reasonable care of them for these purposes. The jury were instructed, in substance, that it was the duty of the railroad company to rest, feed, and water the stock as provided in the statute, and to be reasonably well prepared to care for them at the places they were unloaded for these purposes. This statute should be given such construction as will fairly carry out the object of its enactment. A carrier, when it undertakes to unload stock for the purpose of resting, feeding, and watering, should be reasonably well prepared to care for them in such manner as that they will be rested, fed, and watered; and this without reference to whether the owner is in charge of them or not. The instruction complained of imposed upon the railroad company no duty that was not fairly contemplated by the statute. C., N. O. & T. P. Ry. Co. v. Gregg, 80 S. W. 512, 25 Ky. Law Rep. 2329; C. & O. Ry. Co. v. American Exchange Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 451; N. C. & St. L. Ry. Co. v. Heggie, 86 Ga. 210, 12 S. E. 363, 22 Am. St. Rep. 453; Illinois Central R. Co. v. Eblin, 114 Ky. 817, 24 Ky. Law Rep. 1609, 71 S. W. 919; Hutchinson on Carriers, section 634.

On the question of damage, the jury were instructed that "although the Illinois Central Railroad Company was only liable for injury to the stock between Louis-

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ville and Memphis, Tenn., that the measure of damage against the company is what the jury may believe from the evidence was the difference, if any, between the market value of plaintiff's stock in Arcadia upon its arrival there and what would have been its market value at that point upon its arrival there but for the failure of the company in one or more of the respects indicated in this instruction." The objection made by appellant to this instruction is that it made the condition of the stock upon their arrival at Arcadia, some 200 miles beyond Memphis, Tenn., one of the criterions of the damage appellee suffered, in place of measuring the damage by their condition at Memphis, Tenn. There was no evidence tending to show any negligence or injury between Memphis and Arcadia. All the damage and injury sustained was between Louisville and Memphis. As the carriers agree to transport the stock to Arcadia, appellee could not have recovered for damages sustained by them in transit, unless they were delivered at Arcadia in a damaged condition. Although the stock might have been injured between Louisville and Memphis, yet, if they arrived at Arcadia in a good condition, appellee would not be entitled to recover anything. The condition of the stock when they reached Arcadia, the point to which the carriers agreed to ship and deliver them in good condition, was the standard by which the rights of the parties must be measured. Any other rule would be impracticable. Suppose the stock had been injured in transit from Louisville to Paducah, Ky., which is between Louisville and Memphis, and appellee in an action against the carrier had shown the condition of the stock at Paducah, but not at Arcadia, the objection would at once be made that its liability was not to be measured by the condi-

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tion of the stock at Paducah, but their condition at the place to which it agreed to transport them. Again, if stock were shipped a distance of several hundred miles, under a contract for safe delivery at the place of destination, and between half a dozen stations en route they received distinct injuries, would it be necessary to show the depreciation in value at each place the injury was sustained? And would this be sufficient to warrant a recovery against the carrier without evidence of their condition when delivered at destination? We think not. The only logical and correct method is to fix the measure of damage, as was done in the instruction, and which confined the liability of appellant to injuries occurring on its line. Of course, if the stock had been damaged or injured between Memphis and Arcadia, the Illinois Central Railroad Company would not be liable for such injury or damage, but there was none.

The amount allowed by the jury was not excessive; and the judgment must be affirmed.

Petition for rehearing by appellant overruled.

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CASE 66.—ACTION BY MILFORD ROBERTS AND OTHERS AGAINST E. S. MOSS AND OTHERS FOR TRESPASS TO LAND.—December 19.

Roberts. &c., v. Moss

Appeal from Whitley Circuit Court.

M. J. Moss, Circuit Judge.

From a judgment of dismissal as to defendant E. S. Moss, plaintiffs appeal—Affirmed.

1. Action—Contract or Tort—Waiver of Tort.—One may waive a trespass committed on his land by another by forcibly entering on it and cutting, and removing timber, etc., and sue in assumpsit for the value of the timber cut and appropriated.
2. Judgment—Res Judicata.—Where one converts to his own use the property of another, the latter may sue in trespass, or trover, or replevin, or for money had and received, but a recovery in one action after trial on the merits is a bar to another action, each being for the same act.
3. Same.—A trespass on land and a conversion of goods in one continuous transaction constitutes one cause of action, and a recovery for the goods or for trespass bars an action for the other.
4. Election of Remedies—Inconsistent Remedies.—One who, instead of suing for a trespass on land in the circuit court where the land is located, sues for the value of the timber cut and appropriated in a court which does not have jurisdiction of the trespass, is bound by his election.
5. Judgment—Res Judicata.—A judgment of dismissal on the merits, whether on facts shown by evidence, or averred in the petition and admitted by demurrer, is a bar to another action for the same relief.
6. Election of Remedies—Effect—"Waiver."—Where one sued in assumpsit for the value of timber cut and appropriated by another, he waived the right to recover for any injury resulting from the trespass; "to waive" being to voluntarily relinquish a right one may enforce if he chooses.

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7. Judgment—Res Judicata.—A landowner may maintain ejectment therefor, and under Civil Code Prac., section 83, subsection 2, recover therein, or in an independent suit, for use and occupation, though he has sued for the value of timber cut on the land and appropriated by another, and has been defeated therein on the merits.

T. Z. MORROW for appellant.

To constitute an estoppel by way of res judicata it must be clear, not uncertain. If there is any uncertainty it sets the matter at large, and this uncertainty must appear both by allegation and proof.

"If there be any uncertainty as to the precise question involved and determined in the action, as for example, it appears that several matters are litigated upon any one or more of which the judgment may have turned, the whole matter of the action will be at large." (Am. & Eng. Ency. 2d. Ed., vol. 24, pp. 773-4.)

"A judgment is not res judicata as to a question not appearing on the record or shown by extrinsic evidence." (Ibid.)

In this State extrinsic evidence can not be heard unless pleaded and relied on.

Judge Holt in Mays v. Bowman, 93 Ky., said: "Courts do not favor a plea of res judicata unless it be clear that the merits of the case were considered."

The record of the first suit must shown that the question in the second have been determined in the first. No question is determined not within the scope of the pleadings. (Ibid.)

No damages could have been recovered under the pleadings in Pulaski suit for waste and destruction of trees or for diminution in the value of the land.

"To constitute a bar by former judgment, it must have been on the merits." (Birch v. Funk, 2 Met., 534.)

"A recovery against the defendant for enticing away the plaintiff's wife is not a bar to a subsequent action for criminal conversation with her." (Schnell v. Blohm, 40 Hung, N. Y., 378.)

"Damages for permanent injuries to land from the erection of a structure upon adjoining land is not a bar to an action for transient injuries occasioned by the negligent operation of such structure." (Bramblette v. L. & N., 68 S. W., 145.)

J. N. SHARP for appellee.

We insist that this cause should be affirmed, for the reasons:

1. That the plaintiffs at the time they instituted the suit in the

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Pulaski circuit court they elected to waive the tort and sue for the value of the timber taken. And this was such an election of remedial rights which is irrevocable and conclusive.

2. The plaintiffs can not split an entire cause of action and make it the subject of different suits and thus satisfy a litigous disposition by subjecting a defendant to numerous law suits.

3. Because the judgment in the Pulaski circuit court is a bar to not only what was set up in said action, but to every ground of recovery which might have been presented and determined therein by reason of said trespass.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This is an appeal from a judgment of the Whitley circuit court sustaining appellee Moss' plea and defense of res judicata, and dismissing, as to him, appellants' action, which was one of trespass quare clausum fregit. The petition particularly described two adjoining tracts of land lying in Whitley county, of which it averred appellants to be the owners, and, in substance, charged that appellee and Dennis Bros.. a partnership having its chief office and place of business at Somerset, Pulaski county, in the year, 1903, unlawfully, wrongfully, with force and arms, and without the consent of appellants, entered upon the lands described, drove wagons over the same, and cut down and destroyed much valuable timber thereon, consisting of white oak, chestnut, poplar, pine, and hemlock. For the alleged trespass and consequent injury to the lands and timber, the prayer of the petition asked judgment against appellee and his co-defendants in the sum of $3,000. Appellee, Moss, filed a separate answer to the petition, of three paragraphs; the first containing a traverse, the second a claim of title in appellee to the smaller tract of land described in the petition, and the third the defense of res judicata, which was bottomed on these

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substantially alleged facts: That in an action previously brought by appellants in the Pulaski circuit court against the same defendants a recovery was sought for the value of the timber, alleged in the petition of the case at bar to have been cut by appellee and his co-defendants, and that in the petition of the former suit the trespass to the land for which a recovery was sought in the case at bar was expressly waived. The same paragraph of the answer contains, in substance, the further averments that appellee, by separate answer, filed in the first action, denied the conversion of the timber charged in the petition, or that appellants owned it, and also denied that they were the owners of the land; that the first action was tried in the Pulaski circuit court upon the issues thus formed and on the merits, resulting in a verdict and judgment in appellant's favor against Dennis Bros., for $1,600, but at the same time the jury, under a peremptory instruction from the court, returned a verdict in favor of appellee upon which judgment was entered dismissing the action as to him. Certified copies of the pleadings, orders, and judgment of the Pulaski circuit court in the first action were filed with and made a part of appellee's answer in the last action. Appellants filed a demurrer to the third paragraph of appellee's answer, which was overruled, and they then filed a reply, which controverted in part the affirmative matter of the answer. A demurrer was filed to the reply by appellee and sustained by the court, because, in its opinion, the matters contained therein constituted no defense to the plea of res judicata presented by the third paragraph of appellee's answer. When the demurrer to the reply was sustained, appellants refused to plead further. Thereupon the lower court dismissed their

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action, thereby, in effect, sustaining appellee's plea in bar.

The facts furnished by the averments of appellee's answer and the record of the first action, many of which are not materially controverted by appellant's reply, make it fairly apparent that the timber, for the value of which appellants sued, in the first action, was the same timber, the cutting of which is included in the trespass for which the last action was brought. Therefore it would seem to follow that the forcible entry of appellee and his co-defendants upon the lands described in the petition, their cutting of the timber thereon, the value of which was sued for in the first action, hauling over the land, etc., were all acts and injuries connected with and growing out of the one trespass or successive trespasses for which the last or present action was brought. If so, appellants might have recovered in one action, brought in Whitley county where the lands lie, for the injuries resulting from the several acts of wrongdoing constituting the one trespass or series of trespasses to the lands, and such recovery would have included the value of the timber cut and converted by the defendants. But, instead of pursuing this course, they elected, as they were privileged to do, to waive the tort, i. e., the trespass, committed by appellee and his co-defendants in forcibly entering upon the land, cutting and removing the timber, etc., and to sue them in assumpsit for the value of the timber cut and appropriated by them. That action being a transitory one, it was properly brought in the circuit court of Pulaski county, in which county one or more of the defendants at the time resided. Having thus waived the trespass, and sued appellee and Dennis Bros. for the value of the timber, the cutting and

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removal of which from their lands constituted in part, at least, the trespass complained of, appellants cannot in a subsequent action recover for the trespass. The right to waive a tort and to sue in assumpsit has long been recognized by the law. The rule broadly, yet with entire correctness, may be stated thus: If one takes and converts to his own use another's property, the latter may maintain an action for trespass, or for trover, or replevin, or for money had and received; but a recovery in one, or a failure to recover in one, after trial on the merits, is a bar to another, because each would be for the same act. This question seems to have received careful consideration from Judge Cooley, who, in his admirable work on Torts, concluded an exhaustive discussion of the subject as follows: "The decisions are quite numerous in this country that assumpsit cannot be maintained unless the property of which the plaintiff has been deprived has been converted into money. But other cases decide that if the defendant has converted the property in any manner to his own use, that is sufficient. The following are illustrations: Trading off the property for other property, turning one's cattle wrongfully into another's field and pasturing them there, employing an apprentice without the master's assent, and so on. In all these cases it will appear all the elements of an implied contract are found, and we can conceive of no sufficient reason for denying the right to bring assumpsit. If the wrongdoer has not sold the property, but still retains it, the plaintiff has the right to waive the tort and proceed upon an implied contract of sale to the wrongdoer himself, and in such event he is not charged up for money had and received by him to the use of the plaintiff. The contract implied is one

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to pay the value of the property as if it had been sold to the wrongdoer by the owner. But by all the authorities it is conceded that, where the act is a naked trespass, an action of assumpsit cannot be maintained, because the elements of an assumpsit are wanting. In most cases this is clear enough. Suppose one commits an assault and battery upon another, there is absurdity in the suggestion of a contract that the one party should permit this and the other should pay for it in a reasonable compensation. Suppose his cattle have invaded his neighbor's premises and trampled down and destroyed his crops, the ground for an implication of contract is equally wanting. There is a wrong, nothing more and nothing less. We cannot imply a contract that one party should proceed to destroy the other's crop and then pay him for it. That is an unnatural transaction, and we cannot suppose it would take place except as a wrongful act. But where a trespass is committed, and trees or mineral is severed from the land and taken by the trespasser and converted to his own use, assumpsit will lie for the value of the material so converted." Cooley on Torts, vol. 1, sections 109-111. In Addison, on Torts, a much briefer consideration is given this subject. The author, however, adopts the rule as stated by Cooley. "If a man (he says) has taken possession of property and sold or disposed of it without lawful authority, the owner may either disaffirm his act and treat him as a wrongdoer, and sue him for a trespass, or for a conversion of the property, or he may affirm his acts and treat him as his agent, and claim the benefit of the transaction; and if he has once affirmed his acts and treated him as an agent, he cannot afterward treat him as a wrongdoer, nor can he affirm his acts in part and

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void them as to the rest." Addison on Torts, section 33; Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488. In Van Fleet, on Former Adjudication, vol. 1, section 153, we find this statement of the law: "A trespass upon land and a conversion of goods in one continuous transaction constitutes only one cause of action, so that a recovery for the goods, or for the trespass, bars an action for the other." The case of Johnson v. Smith, 8 Johns. (N. Y.) 383, is in point. The action was one of trespass, quare clausum fregit, and for cutting and carrying away wheat. The defendant pleaded a former suit against him for the wheat, in bar, and the plea was held good. In Savage v. French, 13 Ill. App. 17, the plaintiff brought an action of quare domun fregit. The defendant pleaded in bar a judgment against him in favor of plaintiff in a previous action of replevin for the taking of the same goods. The court held that the judgment in the replevin suit was a bar to the action of trespass for the taking of the same goods, the original cause of action being merged in the judgment.

While we have found no decision of this court upon which the question involved, based upon the precise state of case here presented, the doctrine we announce has nevertheless received its approval. Thus, in Hall v. Forman, etc., 82 Ky. 505, 6 Ky. Law Rep. 473, which was an action to recover upon an attachment bond the special damages embraced by it, it was held that a previous recovery against the principal in the bond of general damages in an action for the wrongful and malicious suing out of the attachment was a bar to the action on the bond. In the opinion, it is said: "While the two actions differ, not only in form, but as to parties, as well as to the testimony necessary

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to establish each, and also as to the extent of the recovery, yet the entire damage is the result of the one act of wrong, and each action is pro eadem causa, or for the wrongful suing out and levy of the attachment. * * * If one trespasses upon another, and in doing so carries away the latter's horse, the owner may waive the trespass and sue for the value of the horse; but, if he do not do so, and sues for the trespass, he could not thereafter sue for and recover the value of the horse, although he may not have sought in the first action to recover for the taking of the horse." Such a splitting of a cause of action as appellants have attempted by the institution of this action the law will not tolerate. They might, as before suggested, by suing in the Whitley, instead of the Pulaski, circuit court, have recovered for the trespass to the land and also the value of the timber, but having failed to do this, and made their election to sue for the value of the timber alone in a court which had not jurisdiction of the trespass to the land, they are bound by that election. And had they first sued in the Whitley circuit court for the value of the timber alone, the effect would have been the same. In Pilcher v. Ligon, etc., 91 Ky. 228, 12 Ky. Law Rep. 860, 15 S. W. 513, it was held that "where one has sued for a part of an entire demand, he will not be allowed to sue for the residue in another action; and this is true, although the court in which the first suit was brought did not have jurisdiction of the full amount of plaintiff's claim, and although the judgment was for the defendant." It is not always necessary that there should be a taking of proof in order to make the judgment rendered in one case a bar in another. A judgment dismissing a petition is a bar to another action for the same relief, provided the

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determination has reached the merits of the case, whether the facts upon which the court acted were shown by evidence, or were averred in the petition and admitted by demurrer. Maize v. Bowman, 93 Ky. 205, 14 Ky. Law Rep. 121, 19 S. W. 589, 17 L. R. A. 81.

We cannot suppose appellants labored under any misapprehension as to their rights at the time of bringing the first action. That they acted understandingly, as well as voluntarily, at the time, is shown by the waiver of the trespass expressly made in the petition in that action. The legal definition of the word "waive" is thus stated by Webster: "To throw away; to relinquish voluntarily, as a right which one may enforce if he chooses; to desert; to abandon." The same author defines the word "waiver" as "the act of waiving, or not insisting on some right, claim, or privilege." As appellants put themselves on record in the first action as waiving, and therefore surrendering, the right to recover for any injury resulting from the alleged trespass committed by appellee and Dennis Bros., except as to the value of the timber taken, and that issue on the trial of that action was determined on the merits in appellee's favor, they cannot complain of the ruling of the lower court holding the judgment in that case a bar to the recovery sought in the last action. The ruling of the court was manifestly correct.

We do not mean to be understood as holding that the question of title to the lands described in the petition was determined or involved in the first action. If appellee is wrongfully in possession of the lands, or any part thereof, appellants may maintain an action in ejectment to recover it, if they are in fact the owners of it; and in such action, if entitled to

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recover the land, they may also recover for its detention or use and occupation by appellee, or may by separate action recover therefor. Civ. Code Prac. section 83, subsec. 2; Burr v. Woodrow, 1 Bush, 602; Shean v. Cunningham, 6 Bush, 123; Walker v. Mitchell, 18 B. Mon. 541. Our decision goes no further in the case before us than to hold that upon the record as presented the lower court's judgment sustaining appellee's plea in bar was proper.

Judgment affirmed.

Petition for rehearing by appellant overruled.

CASE 67.—SEPARATE PROCEEDINGS BY THE EASTERN COAL LANDS CORPORATION IN THE COUNTY COURTS OF THE COUNTIES OF PIKE, FLOYD, KNOTT AND LETCHER AGAINST THE COMMONWEALTH TO LIST FOR TAXATION CERTAIN LANDS, UNDER ACTS OF THE KENTUCKY LEGISLATURE OF 1906.—October 20.

Eastern Ky. Coal Lands Corp. v. Commonwealth (Four Cases).

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Appeal from the Circuit Courts of Pike, Floyd, Knott and Letcher counties.

D. W. GARDNER, Judge Thirty-fiirst Judicial District.

Both the county and circuit court refused to list the lands and on appeal affirmed.

1. Appeal—Jurisdiction—Decision of Intermediate Court—Conclusiveness.—Acts 1906, p. 115, ch. 22, art. 3, section 1, makes

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it the duty of an owner or claimant of land to pay all the taxes which have been or should have been assessed against him as of the years 1901—1905, inclusive, and provides that failure to list for assessment or failure to pay the taxes charged for any three of the years shall be cause for forfeiture to the Commonwealth of his title, which cause of forfeiture shall be extinguished if the owner shall cause the land to be assessed for taxation before March 1, 1907. Section 2 provides that the ascertainment of the amount of taxes unpaid and assessments required by the preceding section shall be made by the county court on the application of the owner, that either the petitioner or the Commonwealth may appeal to the circuit court, and that the finding of the circuit court shall be conclusive and not subject to appeal. Ky. Stats., 1903, section 950, allows appeals to the court of appeals where the title to land is involved or the amount in controversy is not less than $200, and from all other final orders and judgments. Held, That the court of appeals had jurisdiction of an appeal from a judgment of the circuit court, on appeal from the county court, refusing to list lands on petition under section 2, in that the petition was not sufficient under the statute; the word "finding" relating to the fixing of the value of the property assessed alone.

2. Taxation—Assessment—Constitutional Officers—Powers—Statutory Provisions.—Acts 1906, p. 115, ch. 22, art. 3, section 1, makes it the duty of an owner or claimant of land to pay all taxes which have been or should have been assessed against him as of the years 1901—1905, inclusive, and provides that failure to list the land for assessment or to pay the taxes charged as of any three of those years shall be cause of forfeiture of his title to the Commonwealth, which cause of forfeiture shall be extinguished if the owner shall cause the land to be assessed before March 1, 1907. Section 2 provides for the ascertainment of the amount of taxes unpaid and assessments required by the preceding section by the county court on application of the owner. Section 3 provides that, if the owner shall fail to have the land assessed, the Commonwealth's attorney shall institute a proceeding to forfeit the same to the Commonwealth. Section 4 provides for a purchase back by the owner of the title so forfeited on ascertainment by the county court of the amount of unpaid taxes. Constitution section 227 creates the office of assessor, but does not define his duties. Section 172 provides for punishing "any officer or other person authorized to assess values

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for taxation," who shall willfully commit any error. Held, That the act is not unconstitutional, on the ground that it takes from the assessor, a constitutional officer, the power conferred on him alone by the Constitution to assess real estate; the Constitution seeming to imply that the Legislature may provide other persons to assess property.

3. Statutes—Special Legislation—Classification of Subject—Taxation.—The act is not in violation of Constitution section 59, prohibiting local and special legislation, though it may not apply to every county in the State; the classification of the subject, lands which have been omitted from taxation for a great number of years, being a legitimate exercise of legislative discretion.

4. Taxation—Constitutional Requirements—Public Purposes.—Acts 1906, p. 124, ch. 22, section 6, provides that all title proceeded against and forefeited to the Commonwealth, and not purchased by the owner under section 4, is thereby vested in any person who has had adverse possession for five years and paid the taxes. Section 7 provides that all title vested in the Commonwealth, and not purchased back under section 4, nor vested in the occupant under section 6, shall be sold to the highest bidder, and out of the money so realized shall be paid the commissioner's fee and a reasonable attorney's fee. Held, That the act was not in violation of Constitution section 171, that taxes shall be levied for public purposes only, on the ground that investing the occupant with the forfeited title shows that he is the intended recipient of the tax, and that the payment of a part of the proceeds to the officers representing the State is also a provision for their private purposes; such contention confusing the tax levied on the lands and the disposition thereof after forfeiture.

5. Statutes—Expression in Title of Subject of Act.—The revenue law of 1906, the title of which is "An Act relating to revenue and taxation," is not, as to page 115, ch. 22, art. 3, in violation of Constitution section 51, requiring an act to relate to but one subject, which shall be expressed in its title.

6. States—Compacts Between—Violation of Virginia Compact—Taxation.—The Virginia Compact provides that all private rights and interests in lands over which Virginia surrendered sovereignty, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State of Kentucky. Held, That Acts 1906, p. 115, ch. 22, relating to taxation of lands in the State, was not in violation of the Compact; patents to land issued by Virginia being subject to the right and power of the sovereign to compel

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the payment of taxes on the land in the future, and to the correlative power to forfeit the title as a penalty for nonpayment.

7. Taxation — Constitutional Requirements—Uniformity—Double Taxation.—Acts 1906, p. 115, ch. 22, art. 3, section 1, providing that an owner or claimant of land shall pay all taxes which have been or should have been assessed against him for the years 1901—1905, inclusive, and that the fact that the land has been listed for taxation or the taxes have been paid thereon by another claimant shall not relieve him, is not in violation of the constitutional requirement that taxation shall be uniform, as being double taxation.

8. Constitutional Law—Due Process of Law—Taxation.—The act is not in violation of the Federal and State Constitutions, as that it does not constitute due process of law.

9. Same—Ex Post Facto Laws.—The act is not an ex post facto act; the failure to list in the years 1901—1905, inclusive, not working a forfeiture, but the failure after the passage of the act in 1906 to thereafter list the property for those years.

10. Same—Retrospective Taxation.—The act is not, because imposing retrospective taxation, in violation of either the State or Federal Constitution.

11. Statutes—Validity—Review of Policy of Legislature.—Though the objections to an act, that it is harsh, oppressive, and unjust, were well founded, they would afford no basis for declaring the act invalid, since the policy of the Legislature may be looked into by the courts for the purpose only of interpreting statutes, and not of declaring their invalidity.

12. Taxation—Assessment—Proceedings to List—Sufficiency of Petition.—Acts 1906, p. 115, ch. 22, art. 3, section 1, makes it the duty of an owner or claimant of land to pay all the taxes which have been or should have been assessed against him for the years 1901—1905, inclusive; and section 2 provides that the ascertainment of the amount of taxes unpaid and the assessments required by the preceding section shall be made by the county court on application by the owner by verified petition, in which the land shall be described so as to be identified. A petition filed under section 2 alleged that the petitioner claimed to be the owner of the therein described tracts of land, but not of the improvements thereon, nor of the surface of certain parts of each tract, following which was a description by calls and distances, and the petition then set out the patents and instruments through which petitioner derived title, and alleged that the lands had not been listed for taxation for any of the years 1901—1905,

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inclusive, by petitioner, but that parts had been listed by others, and the taxes paid. Held, That the petition was defective, in that it showed only that petitioner was "an owner," and did not show of what part or in what proportion and by whom the remaining portions were owned.

13. Same.—The petition was defective, in that it did not "so describe the land proposed to be assessed' as that "it could be identified," since the interest of the listing owner, if he owns less than the entire tract, must be so described as that it can be identified.

14. Same.—The petition was defective, in that, showing that the patent boundaries described lay only partly in the county wherein it was proposed to list the land, it did not show in what part of the county the parts to be assessed lay, nor where the excluded parts, which it was admitted did not belong to the petitioner, lay.

15. Same.—It is not an answer to the defects in the petition that the taxpayer did not know his property or its description, nor that it woud be too expensive for him to make the necessary investigation.

WM. J. HENDRICK, HOPPIN & BERARD, HAZELRIGG, CHENAULT & HAZELRIGG, JOHN HARRIS HENDRICK and ROBERT L. MILLER for appellant.

N. B. HAYS, Attorney General, CHAS. H. MORRIS, HAGER & STEWART, T. H. PAYNTER, W. H. WADSWORTH, DAVID BAIRD, Z. T. VINSON, EDWARD W. HINES and C. C. McCHORD for the Commonweatlh.

(No briefs—Record not in office.)

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

These four appeals, presenting a common question, are heard together. They involve the constitutionality and construction of article 3 of the revenue law passed by the General Assembly of 1906. Laws 1906, p. 115, c. 22. For a full study and understanding of that article, it is set out complete, and is as follows:

"Section 1. It shall be the duty of every owner or

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claimant of land to pay all the taxes which have been assessed, and which should have been assessed, against him, and those under whom he claims, as the owner or claimant of said land as of the 15th day of September, 1901, the 15th day of September, 1902, the 15th day of September, 1903, the 1st day of September, 1904, and the 1st day of September, 1905; and if the said owner or claimant, or those under whom he claims, has failed to list said land, or any part thereof, for taxation, as of said dates, or any of them, it shall be his duty to have same assessed and listed for taxation, in the manner and within the time hereinafter provided, as of each of said dates for which the assessment has been omitted, and to pay the taxes, interest and penalties thereon as herein provided. The fact that said land has been listed for taxation, or the taxes have been paid thereon by another claimant, shall not relieve against the duty herein imposed. If any such owner or claimant, or those under whom he claims, has failed to list such land for assessment and taxation, as of any three of said dates, or has failed to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant thereof upon said dates, for any three of the years for which said assessments were or should have been made, said owner and claimant and those under whom he claims are hereby declared to be delinquent; and such failures, or either of them, shall be cause for the forfeiture and transfer to the Commonwealth of his said claim and title thereto, in a proceeding to be instituted for that purpose, as hereinafter provided. But said cause for forfeiture shall be extinguished if said owner or claimant, his heirs, representatives, or assigns, shall, within the time and

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in the manner in this article provided, cause said land to be assessed for taxation, and, on or before March 1, 1907, pay the taxes charged, and which should have been charged against him, or against those under whom he claims, as the owner or claimant thereof, for each and all of said five years, for which he or those under whom he claims are delinquent, together with the interest and penalties provided by law in case of the redemption of land sold for the non-payment of taxes.

"Sec. 2. The ascertainment of the amount of taxes unpaid and the assessments required by the preceding section shall be made by the county court of the county wherein the land lies, upon the application of said owner or claimant, by a petition verified by himself or his agents, filed in said court on or before January 1, 1907, in which the land, sought to be charged shall be described, so as to be identified, and the years for which it was not listed and the years in which the taxes were not paid shall be stated, and in which also shall be stated the grant under which he claims, if he derives title from a grant, and the instrument through or the manner in which the title devolved upon him. Said application shall be set for hearing upon a day to be fixed by the applicant, not less than ten nor more than twenty days after the filing of the petition, of which he shall give at least ten days' written notice to the county attorney, whose duty it shall be to attend said hearing and represent the State and county; for which service he shall receive as compensation ten per centum of the amount ultimately collected by sale or otherwise, by virtue of such delinquency. It shall be the duty of the county court to decide upon said application in a summary manner, upon such evidence as may be offered, hav-

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ing due regard to the value of adjacent property as of said dates, and to ascertain the amount of unpaid taxes which the applicant and those under whom he claims should have paid for any and all of said years, whether assessments were originally made as of said dates or not. Upon finding the amount, the court shall also ascertain the proportion of such taxes due for county and State purposes at the rates fixed by law for such years; and shall cause a record of the findings to be made on the order book of the court, and certified to the Auditor of the State and county clerk. Should the court find that the land had been assessed against such owner or claimant, or those under whom he claims, as of any said dates, it shall accept such assessments as a basis upon which to ascertain the amount of unpaid taxes for the year such assessment may have been made. Either the petitioner or the Commonwealth, feeling aggrieved by the finding of the county court, shall have the right to take an appeal, within thirty days after the entry of the findings of the county court, to the circuit court for said county, in the manner that other appeals are taken, except that no bond shall be required of the Commonwealth. It shall be the duty of the circuit court to hear and determine said application de novo, and to give it precedence over all other civil business in said court. The finding of the circuit court shall be conclusive and not subject to appeal. A copy of the findings shall be certified to the Auditor of the State and to the clerk of the county court. As soon as the time for appealing from the finding of the county court has expired, if no appeal is taken, or as soon as the final order of the circuit court is entered, if an appeal is taken, the obligation of said owner or claimant to pay the taxes therein called for,

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with interest and penalties, as provided by law for the redemption of land sold for the nonpayment of taxes, shall be complete; and the same shall be paid to the sheriff of the county within thirty days thereafter. Provided, however, that if in a proceeding hereunder begun within the time allowed, the amount payable by the delinquent shall not be finally determined until within less than thirty days before March 1st, 1907, or until after said date, then the right of forfeiture as set out in section 1 of this article shall not be complete in the Commonwealth, unless and until said delinquent shall have failed to pay said amount, interest and penalties, for thirty days after the entry of said order. Upon collecting said taxes, interest and penalties, the sheriff shall, after paying the costs of the proceedings and retaining the commission allowed by law for himself, pay over and account for the remainder to the Auditor of the State and to the county, in the same manner and subject to the same responsibilities of himself and his bondsmen as in the case of other taxes collected by him. Out of the amount so paid, there shall be paid to the county attorney ten per centum thereof and an additional ten per centum to the Commonwealth's attorney, should an appeal have been prosecuted to the circuit court.

"Sec. 3. If any such owner or claimant shall fail to have said land assessed, or fail to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant of any such tract of land, as provided and within the time prescribed in section 1 and 2 of this article, together with the penalties and interest as provided by law, then it shall be the duty of the Commonwealth's attorney to institute in the circuit court

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of the county in which said land or any part thereof, lies, a proceeding in equity, in the name of the Commonwealth of Kentucky as plaintiff against said tract of land, and the owners or claimants of said land as defendants, naming them; if their names are unknown to him, designating them as the unknown owners and claimants thereof for the purpose of declaring the title or claim of said defendants forfeited to this Commonwealth and selling same. The suit so instituted shall be proceeded with to final judgment in all respects as other equity causes so far as applicable. In addition to the requirements of the Civil Code of Practice respecting process and service thereof, notice shall be given of the pendency of said action by posting a copy of the petition at the front door of the court house, which shall be done by the clerk immediately after the petition is filed, and he shall show by endorsement upon the original petition the time at which said copy was so posted. The defendants shall not be required to answer until after the expiration of thirty days from the posting of said copy. And such copy when so posted, shall be deemed notice to all defendants of the pendency of said action and its object. The petition of the plaintiff shall allege the facts constituting the cause of forfeiture under the provisions of this article, and there shall be filed with it a copy of the grant or instrument upon which the title or claim sought to be forfeited is based; and no other title, claim or possession, or continuity thereof, whether owned or claimed by the defendant or by others, shall be forfeited or in any manner be affected by said proceeding. The prayer shall be for a judgment of forfeiture and sale of the title or claim in the petition described. The court shall render judgment in accordance with the pleadings,

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exhibits and evidence adduced; and if it shall find that said title or claim sought to be foreited is or has been subject to forfeiture under the provisions of this article, it shall render judgment declaring the same forfeited and the title thereto vested in the Commonwealth. Such judgment shall operate as a transfer to and vesting in, the Commonwealth of the said title and claim of each and all the defendants, and those under whom they claim, without execution of deed or other instrument. If the court shall find that the same is not subject to forfeiture under the provisions of this article, then it shall so adjudge and dismiss the petition of plaintiff. Judgments rendered by the circuit court under this article shall be conclusive as against all defendants, including infants, lunatics and married women, as to their title or claim derived through or under the grant, title or claim described in the petition; and said judgments and the proceedings upon which they are based shall not be subjected to the provisions of sections 391, 410, 414 or 574 of the Civil Code of Practice. Issues as to whether or not the title and claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, shall be triable by jury; and the judgment of the court shall be in accordance with the verdict, as in ordinary actions. Either party may prosecute an appeal from such judgment to the court of appeals within thirty days after the same may be entered; but if any such appeal be prosecuted, the transcript of the record shall be filed in the court of appeals within sixty days after the entry of said judgment; and the hearings upon appeal shall have the same precedence as other Commonwealth cases. No bond on appeal shall be required of the Commonwealth.

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"Sec. 4. If, before or during the term of the circuit court next succeeding the term at which a judgment of forfeiture may have been entered, as authorized by section 3 of this article, any of the said defendants in privity with the title so forfeited to, and vested in the Commonwealth, file his counterclaim in said action, accompanied by a bond, with good and sufficient resident personal security, to be approved by the court, if in session, otherwise by the clerk of the court, conditioned to pay, and in all respects abide by and perform, the judgment that the court may enter upon such counterclaim, and in said counterclaim offer to purchase back from the Commonwealth the title and claim in said action so forfeited to, and vested in, the Commonwealth, and praying to be allowed so to do, and exhibiting title thereto in himself, it shall be the duty of the court, upon proper pleadings as in other equity cases, and upon such evidence as may be adduced in the manner authorized by law, to ascertain and adjudge the amount of unpaid taxes, charged and that ought to have been charged against the defendant and those under whom he claims, as the owner or claimant of said land, for fifty years immediately preceding the filing of such counterclaim, and if the court finds and adjudges that said defendant is the owner of the title so forfeited to and vested in the Commonwealth, to enter a judgment against said defendant for a sum equal to the amount of the unpaid taxes charged, and that ought to have been charged, against said defendant, and those under whom he claims as the owner or claimant of said land, for said fifty years, together with interest thereupon at the rate of 15 per cent. per annum from the time of the said unpaid taxes for said several years were due, and the costs of the proceedings,

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including a reasonable attorney fee for the Commonwealth's Attorney, to be fixed by the court: Provided, that no person except a defendant, and no defendant, except as herein provided, shall be allowed to purchase back from the Commonwealth the title so forfeited to, and vested in it except such defendant as may, but for such forfeiture, establish in such proceeding a title thereto in himself upon which he could maintain an action of ejectment. If, thereupon, such defendant shall pay to the sheriff the amount of such judgment, it shall be the duty of the court to enter judgment retransferring to such defendant the title and claim so forfeited to, and vested in, the Commonwealth; and said judgment shall have the effect of retransferring and vesting same in said defendant without the execution of a deed or other instrument. Should such defendant not thereupon pay said judgment, the court shall thereupon enter an order directing the sale of the said title and claim as in section 7 of this article provided, and the amount realized upon said sale shall be used in the payment of costs and commissions hereunder; and the remainder, if any, shall be paid to the State and county as provided in this article, and the counterclaim shall be dismissed. If the sale does not produce enough to pay the costs, an action may thereupon be maintained upon said bond for the costs, and reasonable attorney's fee for the Commonwealth and county attorney, to be fixed by the court. If at any time during the pendency of said action it shall be made to appear that the bond theretofore tendered and approved by the court or the clerk is insufficient, additional security shall be required, and the failure to execute same upon being so required shall have the same effect as if no bond had been given originally, and the counter-

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claim shall be dismissed. Appeal may be prosecuted to the court of appeals from the judgment of the circuit court under this section within the time and in the manner and subject to all the conditions provided for appeals in section 3 of this article, except that the judgment of the circuit court as to the amount thereof shall be final and not subject to appeal. All amounts paid to the sheriff under this section shall be by him received and paid out to the persons entitled to the same as costs, and the remainder to the Auditor of the State and to the county in proportion to the amount due them for taxes and penalties for the said fifty years, in the same manner and subject to the same responsibilities of himself and his bondsmen as in the case of taxes collected by him: Provided, that fees required by law to be paid to the Auditor shall be paid to him by the sheriff, and by the Auditor paid to the person entitled thereto. It shall be the duty of the county attorney to assist the Commonwealth's attorney in all proceedings under this article for which he shall be allowed the per centum as herein provided. Certified copies of the judgments of the circuit court, under sections 3 and 4 hereof, shall be recorded in the deed books of the county where the land, or any part thereof, lies, and indexed as deeds are required to be indexed.

"Sec. 5. Any owner or claimant who instituted a proceeding allowed by section 2 of this article, and who did not, within the time herein limited, pay the amount herein ascertained as charged or chargeable against him and those under whom he claims, as the owner or claimant of said land, shall not be allowed the right to purchase back, under the proceedings authorized by section 4 of this article, such title or

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claim so forfeited to, and vested in, the Commonwealth.

"Sec. 6. All title and claim proceeded against under this article and forfeited to, and vested in, the Commonwealth and not purchased back by the owner or claimant thereof, as authorized in section 4 hereof, whether such forfeiture be for the past delinquencies or for future delinquencies as authorized under section 10 hereof, shall be, and is hereby, transferred to, and vested in, any person for so much thereof as such person, or those under whom he claims, has had the actual adverse possession for five years next preceding the judgment or forfeiture, under claim, or color of title, derived from any source whatsoever, and who, or those under whom he claims, shall have paid taxes thereupon for five years in which such possession may have been or may be held; and in those in privity with such person, his heirs, representatives or assigns, as to the mineral or other interests or rights in or appurtenant to such land.

"Sec. 7. All title and claim to land transferred to, and vested in, the Commonwealth under the provisions of this article and not purchased back by the owner or claimant as provided by section 4, and not vested in the occupant, as provided in section 6, shall be sold to the highest and best bidder for cash in hand. Said sale shall be made pursuant to a judgment of the circuit court in said action, and shall be at public auction at the front door of the court house on the first day of some regular term of the circuit court, after notice of sale shall have been advertised in the manner required by law in the case of sales of land under execution. The commissioner shall report the sale to the court for its confirmation, and, when confirmed, the court shall order the commis-

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sioner to make a deed to the purchaser. Such deed shall operate to transfer to said purchaser such title and claim to the land so forfeited and transferred to, and vested in the Commonwealth as remains in it after the operation of section 6 of this article, and shall so recite. The money realized from the sale shall be paid out and distributed as follows: First, to the payment of the costs of the suit, including commissioner's fee as fixed by law and a reasonable atttorney's fee, to be fixed by the court and paid in the manner provided by law; second, to the county and State the proportion to which each may be entitled, together with interest and penalty, as in this article provided; third, the remainder shall be paid over to the former owner or claimant or his personal representatives or assigns.

"Sec. 8. No action to enforce a forfeiture as authorized and provided in this article shall be instituted after the expiration of five years from the accrual of the right thereto.

"Sec. 9. No owner or claimant of any land in this Commonwealth shall be allowed to prevent the operation of this article by the payment, after January 1st, 1906, of any amount less than the whole of the unpaid taxes, interest and penalties provided by law, that were charged, and that should have been charged against said owner or claimant of said land and those under whom he claims, as of each and all of said five dates, first mentioned in section 1 hereof; and where such payment is made after the passage of this act, the amount to be paid shall be ascertained and payment made, as in this article provided.

"Sec. 10. When, for any successive five years after the first day of August, 1906, any owner or claimant of or to any land in this Commonwealth

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shall fail to list same for taxation and cause himself to be charged with the taxes properly chargeable thereon, or fail to pay the same as provided by law, then such failure shall be cause for the forfeiture of his title and claim thereto, and the transfer of the same to, and vesting it in, the Commonwealth of Kentucky. And wherever such failure exists, it shall be the duty of the Commonwealth's Attorney to institute an equitable action in the circuit court of the county wherein the said land, or a part thereof, lies, for the purpose of declaring said forfeiture and vesting said title and claim thereto in the Commonwealth of Kentucky, and for the sale of such parts thereof as, under the provisions of this article, are liable to sale. Such actions and proceedings pertaining thereto shall conform to the provisions of this article as far as the same may be applicable."

It is also proper, and perhaps necessary, to set out here so much history of the State as will disclose the evil sought to be remedied by this act, in order that the legislative purpose may be more surely divined. While prior to 1779 a considerable quantity of the wild lands of Virginia west of the Allegheny mountains had been appropriated by patents under the stimulus of enterprising adventurers and the policy of the colony to encourage emigration and the settlement of the vast wilderness territory then inhabited almost exclusively by savages, it was after the War of the Revolution, when the returning soldiers from the Continental army were to be compensated in a measure by such favor as the State could bestow, that the real tide of emigration to the West set in. In 1779 Virginia established a land office, and created the office of Register of the Land Office. Most liberal inducements were offered settlers of "waste and un-

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appropriated lands." There was no limit to the quantity any person might appropriate. Surveyors were appointed for the western territory upon the nomination of the president and professors of William and Mary College. They were required to make records of entries and surveys under them. Their peripatetic offices were widely scattered. The territory opened up for settlement under this act was that part of Virginia south of the Ohio river, east of Green river, west of the Cumberland mountains and north of the Carolina line, excepting certain Indian reservations. In other words, it comprised all of the eastern and most of the central part of what is now the State of Kentucky. The surveyors so appointed could appoint any number of deputies, and did appoint a great many. Aside from the lack of roads and the difficulties of travel in a region of unbroken forests, with great rivers and mountains to be traversed, the dangers from bands of roving savages and wild beasts that infested that vast region made intercommunication between these officers both difficult and dangerous. 2 Collins' Hist. Ky. 552, 563. There was a constantly growing tide of immigration into the newly opened territory. Many of the immigrants, probably the most of them, were intending settlers. But, as might have been expected, speculators and adventurers not a few were attracted thither by the glowing accounts which were carried back to the older settlements in the east. Large tracts, some of them for many hundred thousand acres, were entered, located, and surveyed, while many thousand smaller tracts, designed for immediate or present actual settlement, were taken up at the same time. So rapid was the growth of population that in 1790 the white population of that terri-

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tory which later became the State of Kentucky, was 61,000. 1 Marshall, Hist. Ky. 441. These people, so far removed from their seat of government, and so imperfectly protected, as was inevitable under the existing conditions, were clamorous for a separate and independent State government. On the 18th day of December, 1789, Virginia indicated by an act of her assembly the terms on which she would consent to part with her sovereignty over the new territory. This was agreed to, and is what is known as the "Virginia Compact." It was even then foreseen that conflicts would arise concerning the grants of land already made, or the initial steps of which had been begun. Perhaps the delay experienced by the Kentucky pioneers in obtaining the consent of the mother State for a separation was due to the influence of those who had taken up large boundaries of land in Kentucky for speculative purposes. At any rate the Compact abounds with evidence of the fact that controversies among claimants and settlers concerning the validity and location of these entries had already arisen in considerable numbers, and were then also foreseen as future problems. The Compact, in so far as material in this investigation, reads:

"Sec. 7. Third, that all private rights and interests of lands within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State."

"Sec. 9. Fifth, that no grant of land or land warrant to be issued by the proposed State shall interfere with any warrant heretofore issued from the land office of Virginia, which shall be located on land within the said district, now liable thereto, on or

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before the first day of September, one thousand seven hundred and ninety-one.

"Sec. 10. Sixth, that the unlocated lands within the said district, which stand appropriated to individuals, or description of individuals, by the laws of this Commonwealth, for military or other services, shall be exempted from the disposition of the proposed State, and shall remain subject to be disposed of by the Commonwealth of Virginia, according to such appropriation, until the first day of May, one thousand seven hundred and ninety-two, and no longer; thereafter the residue of all lands remaining within the limits of the said district, shall be subject to the disposition of the proposed State."

"Sec. 14. And be it further enacted, that if the said convention shall approve of the erection of the said district into an independent State on the foregoing terms and conditions, they shall and may proceed to fix a day posterior to the first day of November, one thousand seven hundred and ninety-one, on which the authority of this Commonwealth, and of its laws, under the exceptions aforesaid, shall cease and determine forever over the proposed State, and the said articles become a solemn compact binding on the parties, and unalterable by either without the consent of the other."

At a convention called for the purpose of considering the proposal, the Compact was accepted by the district of Kentucky, as the new territory was then called, on July 20, 1790. An act of Congress (Act Feb. 4, 1791, c. 4, 1 Stat. 189) provided for admitting the new State into the Union, which was consummated in June, 1792. The early records of this court, and of its predecessor, the Supreme Court of the District of Kentucky (Hughes' Reports), abound in evi-

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dence of the confusion into which the land titles of the young Commonwealth had fallen, even before it was launched as a State. It is easy to gather from these records that not the least of the difficulties with which the new State had to deal was the tangled condition of one of the most important features of its society, namely, the status and validity of the titles to its lands. The handicap was serious, and has been persistent. The system was loose and uncertain, admitting not only of honest mistakes, but of easy opportunities for frauds and oppression. It was peculiarly adapted to the purposes of mere speculation. The system of entering and surveying unappropriated lands was, unhappily, though not unnaturally, brought over into the new State and continued. Indeed, in the first Constitution, adopted April 16, 1792, it was provided (section 6, art. 8): "All laws now in force in the State of Virginia, not inconsistent with this Constitution, which are of a general nature, and not local to the eastern part of that State, shall be in force in this State until they shall be altered or repealed by the Legislature." And the book of the statute laws of Kentucky for years thereafter was Littell's Statutes, compiled from the Virginia statutes and the first legislative enactments of the new State.

Provision was at once made for transferring from the records of Viriginia the evidence of grants and conveyances of lands in the old district of Kentucky. They were required to be deposited as part of the records of the office of the clerk of this court at the seat of the State government, removed a week's travel at that time from the State's eastern domain Under the existing system, and for the supposed convenience of proposed settlers, the records of new entries

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and surveys were kept by the county surveyors, although it does not apear that they were required to maintain public or permanent offices at the various county seats. Many, maybe most, of the pioneer settlers of this State, were unlearned "backwoodsmen." Perhaps many of the local surveyors were but little advanced in education. Vacant lands were supposed to be plentiful. Consequently land was then the cheapest of commodities, if it might be so called. Many a noble estate, as it is now, passed then in exchange for a rifle gun or a powder flask. As new counties came to be formed, as they were rapidly enough, new county seats, with new offices and new records (without provision for transcribing the old in so far as they affected the new counties), were created, and were doubtless most generally supposed to contain all necessary data for the guidance of the settlers in taking up and conveying land. It resulted that new patents were issued for lands already appropriated by previous grants. In many instances several patents overlapped the same land. This went on with little change for nearly a hundred years. The recent and present occupants were innocent enough of knowledge or purpose, it may be safely assumed, to do ought than follow the course of the law, buying from the State in confidence, and selling among themselves with assurance that which they had bought, paid for, and at great sacrifice of labor, means, and care erected into permanent homes. It now develops, and has been known for some time, that all or most or the vast territory lying to the northwest of the Cumberland mountains, and west of the Tug Fork of Big Sandy river, to a point west of the main Kentucky river, was appropriated under entries and surveys made by virtue of the laws of Virginia before the

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separation in 1792. Few of those entries were ever settled upon. So far as the new settlers knew in fact, in every probability, the lands were unappropriated. The generations of a century have thus increased, and by actual occupancy, by personal industry and thrift, and by all the means by which the Americans create a Commonwealth, they have fastened themselves to the soil in the belief that they have inherited it from their fathers, or purchased it honestly from their neighbors, and that it is theirs.

Notwithstanding that millions of acres have thus been reduced to that kind of actual possession and for such a period as to ripen into a perfect title in spite of its original state, and that the population of this territory is now more than 300,000, there are many hundred thousand acres of these lands unfenced, whose stores of mineral and mantles of forest have remained in their natural state until the present hour. Commercial necessity and enterprise in recent years are opening this region to the markets, and what was once of small value has become enormously important and valuable. The holders of these old grants during all these years have taken no part in the development of the section where these lands lie, nor done aught to add to the State's strength and stability in peace or in war. They have contributed nothing in clearing the lands for settlement. They have not tenanted them. They have not worked them. Every incentive of the government (save the pittance paid into the treasury for the warrants) which entered into the grant by the State has been withheld or disappointed by the grantees and those claiming under them. The State was then and is yet concerned in the subject of actual settlement, of homesteaders tied by interest and patriotism to the State's wel-

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fare. It was from the first and is yet a proper subject of public concern that these lands be seated by settlers, to the end, at least, if no greater, that the State might derive taxes from them for its support. While the people in that section may have been unmindful of the underlying insecurity of their titles, the subject has been one of constant concern to the State. The situation was one of practical difficulties. On the one side was the legal right of the original patentees. On the other was the moral right of those who had, in ignorance of the truth, bought and settled upon some parts of these same lands. Besides it all was the Compact with Virginia, an international agreement in its nature, the legal effect of which, from environment and circumstances, was little understood in the State. There was the purpose to live up to the spirit of the Compact in good faith, and fear of its letter. Let us now follow in a brief review the course of legislative and judicial cognizance of the situation.

On June 26, 1792, the General Assembly of this State (1 Litt. Laws Ky. p. 63, c. 10) enacted a statute, by the fourteenth section (page 71) of which it was provided that all lands of which a list shall not be given in by the owner or proprietor to the commissioner on or before February 4, 1795, and on which taxes, with interest, should not be paid, should be considered as, and actually be, forfeited to the State, and should be disposed of in such manner as should be directed by law. In 1801 the Legislature, extending the time to save forfeiture, re-enacted the forfeiture clause. 2 Morehead & B. Ky. St. p. 1072. This court, construing that statute in 1822, held that the act did not, properly construed, dispense with an inquisition of office found, and that forfeiture was not

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worked by the mere operation of the statute. Barbour v. Nelson, 1 Litt. 60. In 1812 the act known as the "Occupying Claimants Law" was adopted, which in 1823 was held unconstitutional by the Supreme Court of the United States in Green v. Biddle, 8 Wheat. 1, 5 L. Ed. 547, though by a divided court. In 1824 the act known as the "Seating and Improvement Bill" was adopted, requiring the fencing of a certain portion of each tract of 1,000 acres or more, under penalty of forfeiture. 2 Morehead & B. Ky. St. p. 1074. This act was held unconstitutional in Gaines v. Buford, 1 Dana, 481; the Chief Justice not sitting, and the two remaining judges writing divergent opinions as to the reasons upon which the court's action was based. These opinions, and that of the Supreme Court in Green v. Biddle, as well as certain resolutions of the General Assembly of Kentucky, adopted January 11, 1825 (vide Acts 1824, pp. 275-278) all indicate an unsettled state of judicial and legislative opinion as to the precise effect of the Compact as limiting the power of Kentucky in passing laws upon these subjects. On January 12, 1825, the forfeiture laws, on account of nonlisting of lands for taxation, were re-enacted, with the additional provision (doubtless moved by the court's language in Barbour v. Nelson, supra) that the forfeited title should be transferred to the Commonwealth without office found. In February, 1828 (2 Morehead & B. Ky. St. p. 1081) it was enacted that all title forfeited to the Commonwealth for failure to list property for taxation should inure to the benefit of the occupant in possession.

These latter acts were carried forward into the general revision of 1860 (2 Rev. Stats., pp. 103-106, cc. 58, 59), and by the act of 1860, (2 Rev. Stats., p.

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757) it was enacted that land forfeited prior to 1834 should remain unredeemable. It was evidently thought by the Legislature that the provisions of the act of 1825 were valid, as they had not been questioned judicially up to that time. In the revision of 1873 (section 1, art. 17, c. 92, Ky. Stats.) the same provision was made for the forfeiture of lands not listed and tax-paid. In 1878 a case came before this court in which was involved the constitutionality of the provisions above cited relating to forfeitures without office found. Marshall v. McDaniel, 12 Bush, 378. It was there held by this court that such attempt to forfeit was unconstitutional; that the landowner must first have his day in court.

Thus the matter stood when the convention of 1890 met to revise the Constitution. This subject was deemed of enough importance to justify the creation of a special committee on "Land Titles." Various proposals were made to the convention, among others one by the member from Wolfe, Powell, Menifee, and Montgomery, embodying substantially the same provision as is contained in the act which is the subject of this opinion. The result of the deliberations of the convention was section 251 of the present Constitution. The debates show that the delegates were alive to the very evil which is herein set forth, and which we will see was presented to the Legislature in 1906 for its consideration. Section 251 of the Constitution as finally adopted reads: "No action shall be maintained for possession of any lands lying within this State, where it is necessary for the claimant to rely for his recovery on any grant or patent issued by the Commonwealth of Virginia, or by the Commonwealth of Kentucky prior to the year one thousand eight hundred and twenty, against any

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person claiming such lands by possession to a well defined boundary, under a title of record unless such action shall be instituted within five years after this Constitution shall go into effect, or within five years after the occupant may take possession, but noth ing herein shall be construed to affect any right, title or interest in lands acquired by virtue of adverse possession under the laws of this Commonwealth." Doubtless the moving cause of the adoption of this provision, one of limitation, instead of the one proposed by the delegate from Wolfe, Menifee, Powell, and Montgomery, was that the Supreme Court of the United States had held that this State could legally enact a shorter limitation period than existed under the laws of Virginia in 1790 (Hawkins v. Barney, 5 Pet. [U. S.] 457, 8 L. Ed. 190—this court holding the same way in Beard v. Smith, 6 T. B. Mon. 430 ;whereas, neither court had up to that time passed upon the validity of a statute such as is now being considered. The first Legislature after the new Constitution of 1891 also attempted to help out the situation along the same line. It enacted section 2377, Ky. Stats. 1903, providing that no one should maintain an action in ejectment upon a patent issued prior to 1820 who had not paid 20 years taxes on his title. But this court in 1901, in Shaw v. Robinson, 111 Ky. 715, 64 S. W. 620, 23 Ky. Law Rep. 998, construed the language "title of record," of section 251, Const., to mean a title from the Commonwealth upon a valid patent, and denounced section 2377, Ky. Stats., 1903, supra, as unconstitutional upon the ground stated in Marshall v. McDaniel. Thus we see that from the beginning this State has been endeavoring to rid itself of the incubus caused by the dormant titles and inactive owners or claimants, who refused, or at least per-

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sistently failed, to do anything toward supporting the State government, or allowing the property which they claimed to do so. We also see that, notwithstanding the public insistence and the important question of governmental policy involved, this court has from the start adhered to the strictest construction of the terms of the Compact and of the constitutional rights of the delinquents, so as to afford them every chance to come forward and save whatever title or claim they had. And yet they did nothing.

It will be remembered that in Virginia there was substantially the same state of affairs as in parts of Kentucky, for that region lying between the Allegheny mountains and the borders of Kentucky was of the same character of land, and had been appropriated by the same methods and under the same system, and at or about the same time, as had the lands in Kentucky. Naturally the same result ensued. In 1790 the Commonwealth of Virginia enacted a statute (13 Hen. Stat. at Large, p. 116, c. 5, sec. 5) by which title to lands not tax-paid for three years were "forfeited and vested in the Commonwealth." The act was extended and re-enacted in increasing vigor in 1792, 1803, and 1810. In 1835 a still more drastic act was adopted (Hutchinson on Land Titles of Virginia, p. 62), the salient features of which are incorporated in the act of Kentucky now being investigated, except that in the Virginia act there is no provision for an inquisition of office, or its equivalent, as there is in the Kentucky statute. This act has been before the Supreme Court of Appeals of Virginia a number of times, and has always been upheld as constitutional. Wild's Lessee v. Serpell, 10 Grat. 408; Staats v. Board, 10 Grat. 400; Smith v. Chapman, 10 Grat. 445, and Hale v. Branscum, 10

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Grat. 418. West Virginia was erected into a State in 1863. All of her territory was carved out of old Virginia, and was wholly within the zone affected by the system of grants above discussed. In her Constitution is a provision in every feature or principle the same as the Kentucky statute of 1906, except that in the West Virginia Constitution there is not a provision for a trial in court concerning the proposed forfeiture. Article 13, sections 1-6, Const. W. Va. (Code 1906, pp. lxxxiv, lxxxv). The Supreme Court of West Virginia has also upheld the forfeiture provisions as not depriving the landowner of his property without due process of law, and as being not only just, but wise and politic, legislation. McClure v. Maitland, 24 W. Va. 561; McClure v. Mauperture, 29 W. Va. 633, 2 S. E. 761; Twiggs v. Schovallie, 4 W. Va. 463; Smith v. Tharp, 17 W. Va. 221; Hays v. Camden's Heirs, 38 W. Va. 109, 18 S. E. 461; Wiant v. Hays, 38 W. Va. 861; 18 S. E. 807, 23 L. R. A. 82; State v. Sponaugle, 45 W. Va. 420, 32 S. E. 283, 43 L. R. A. 727. The question arose in a case which was before the Supreme Court of the United States in 1898 (King v. Mullins, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214) whether the West Virginia provision was repugnant to the federal Constitution as depriving one of his property without due process of law. The court recognized that the term "due process of law," as used in the federal Constitution, must mean the same thing throughout the Union. It also held that the term might be satisfied with a different provision for a hearing as concerned tax matters from what would be required in a controversy between individuals. The court refused to say that the provisions of the West Virginia Constitution and of the statutes of Virginia forfeiting the title

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to land without office found for the nonlisting and nonpayment of taxes by their claimants was repugnant to the "due process of law" guaranty of the federal Constitution. Bnt the court did say, as being all that was necessary to a decision of the case in hand, that inasmuch as there was a provision in the statute of West Virginia by which the lands forfeited under the Constitution of that State were sold under a decree of a court, in an action to which the former owner was made a party and in which he was allowed to redeem on certain contingencies, it was in every sense a sufficient compliance with the requirement that the owner be given a day in which to contest the proposed forfeiture. The West Virginia provision was therefore upheld.

Thus we see that in 1906 the Legislature was confronted with this situation: Every evil that had existed from the beginning, threatening the stability of the land titles of a large and important section of the State, was still unalleviated; that every legislative measure adopted during the past 115 years had been unavailing; that in spite of their public duty, and of the imperative command of the law and needs of the State, these claimants refused to respond, and were beyond the reach of the law then in existence; that the reason of the failure of the previous legislation upon the subject was those constitutional obstacles which had been pointed out in various opinions of this court and of the Supreme Court of the United States; that similar conditions produced by the same cause had existed in two of our sister states; that they had gone further than Kentucky had in an attempt to relieve the situation; and that their efforts had been successful, and were without legal exception. The idea was not new to the Legislature that

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the duty of the Commonwealth was to protect herself from a continuation of that thrall that was paralyzing the energies of a large section of the State, disturbing its peace, and robbing the State treasury of its revenues. Thereupon article 3, p. 115, c. 22, of the Acts of 1906, was most deliberately adopted. The revenue laws of Kentucky, in the opinion of the previous Legislature, needed radical revision. A commission was raised to study the question, to hear complaints and suggestions, and to bring in at the next session a new bill covering the entire subject. Two years were allowed for the work. The committee did as directed. The whole system of the State's revenue laws was revised, and an entirely new, complete measure introduced and enacted. Acts 1906, pp. 88-248, c. 22. Article 3, as quoted above, was in this deliberate manner proposed and adopted. There can be no doubt that the Legislature determined to outlaw these dormant titles, and thereby protect the treasury and increase the State's revenues. Nor can there be doubt that the legislative purpose was to proceed carefully and in that manner that would satisfy the requirements of the Constitutions of this State and of the United States. The Legislature did not intend to deal tenderly with a situation that had been aggravating in its merits. It realized that sometimes sternness is justice, and further leniency injustice. The Legislature has squarely faced the problems of the situation. The court has no disposition to look at it otherwise than it is—to pass upon the questions of law presented, grim and bare as they may be.

Proceeding under article 3 of the act of 1906, appellant, claiming to be an owner of certain patents issued upon Virginia warrants prior to 1789, petitioned the county courts of Pike, Floyd, Knott, and Letcher to

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list for taxation against it 275,235 acres of land in Pike county, 88,215 acres in Floyd, 55,020 acres in Letcher, and 29,058 acres in Knott, aggregating 447,528 acres. The county courts refused to list the lands upon the ground that the petitions were not sufficient under the statute. This feature will be noticed particularly further along. On appeal to the circuit courts of those counties, the same conclusion was reached, and the appellant's applications were refused, whereupon these appeals are prosecuted to this court.

The first question presented is, has the court jurisdiction of the appeals? The appellate jurisdiction of this court is regulated by statute. Only such matters as the Legislature may see fit to allow to be brought here on appeal are cognizable by the court. No person has an inherent right of appeal, however natural the notion that appellate courts should be open always, as are all other courts, to a litigant who conceives that his rights have been denied. But jurisdiction, and final jurisdiction, must be lodged somewhere. It has been left to the Legislature to do that. It is exceptional, indeed, when appeals are allowed in the matter of tax assesments. The reasons are obvious. But they are sometimes allowed by legislation. The language of the statute in question must be looked to, to see whether an appeal to this court is denied, in spite of the provision of the General Statute fixing this court's appellate jurisdiction. A clause of a section of this article provides that the county court, "upon finding the amount, * * * shall cause a record of the findings to be made on the order book of the court and certified to the Auditor. Should the court find that the land has been assessed * * * as of any of said dates,

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* * * it shall accept the assessment as a basis upon which to ascertain the amount," etc. "The finding of the circuit court shall be conclusive and not subject to appeal. A copy of the findings shall be certified to the Auditor of the State, and to the clerk of the county court." Section 2, art. 3, p. 118, c. 22, Acts 1906. Under section 4241, Ky. Stats. 1903, relating to proceedings by auditor's agents to have omitted property assessed, a similar provision occurs, though not in the same language. There the finding of the lower tribunals as to the value of the property assessed is not subject to appeal, but an appeal is allowed upon the question of the liability of the property to assessment. Appeals are allowed to this court from final judgments in all cases in circuit courts where the title to land is involved, or where the amount in controversy, exclusive of interest and costs, is not less than $200. "In all other civil cases, the Court of Appeals shall have appellate jurisdiction over the final orders and judgments of all courts." Section 950 Ky. Stats. 1903. We construe the word "finding" in the act before us as relating to the fixing of the value of the property assessed. To that extent only is the appellate jurisdiction of this court, as fixed by section 950, Ky. Stats. 1903, supra, curtailed. We are of opinion that this court has jurisdiction of the appeals.

The constitutionality of the act is questioned by appellant. The question must be decided, as, if it is unconstitutional, appellant would have had the right to list its lands under other provisions of law relating to the assessment of omitted property. If it is constitutional, then, unless appellant has complied with its terms, the action of the lower court

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was right. We will take up the different grounds upon which the act is assailed:

First. It is said to be void "because it takes from the assessor, a constitutional officer, the power conferred upon him alone by the Constitution and the laws pursuant thereto to assess all real estate." Section 227 of the Constitution creates the office of assessor, but does not define his duties. Section 172 of the Constitution requires all property not exempt from taxation to be assessed at its fair cash value, and provides for punishing "any officer or other person authorized to assess values for taxation," who shall willfully commit any error in the performance of his duties. This seems to imply that the Legislature may provide other persons to assess property. It has always been done that way under the present and preceding Constitutions. Railroads, and other public service corporations, distillers, and dealers in rectified spirits are, and for a long time bank and trust companies were, assessed by "other persons," than the county assessor. The latter cannot assess for any period than the current year. All omitted assessments are done by the county court, and have been for many years, certainly ever since the adoption of the present Constitution. This question was raised in Commonwealth v. E. H. Taylor, Jr. Company, 101 Ky. 325, 19 Ky. Law Rep. 552, 41 S. W. 11. and there decided adversely to this appellant's contention.

Second. It is claimed that the act is local and special, and thereby violates section 59 of the Constitution. The only point urged in brief of counsel under this head is that "the act could not apply at the very outside to more than 20 or 25 counties in Kentucky." But that does not constitute the legis-

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lation either local or special. A statute regulating the care and use of natural gas wells might not apply in fact to more than a dozen counties in the State. Nevertheless the terms of the statute are general, and are applicable to every portion of the State where the conditions may exist, or may arise in the future. The classification of the subject, lands which have been omitted from assessment for a great many years, is a legitimate exercise of legislative discretion. It finds many counterparts in the statute respecting other classes of property, such, for example, as special provisions regarding the listing of nonresidents' lands and the assessment of dealers in tobacco and liquors. The act is as general as the nature of its subject will admit. That it may not apply to every county would be because the general condition treated of did not happen to exist in that county. Nevertheless the act is not thereby made local. Nor is its subject special legislation in any legal sense.

Third. It is claimed that the act violates section 171 of the Constitution, which requires that taxes shall be levied for public purposes only. The grounds of this objection are (1) that the provision for investing the occupying claimant with the forfeited title shows that he is the intended recipient of the tax; and (2) that the provisions for the sale of the other forfeited lands, and the payment of some part of the proceeds to the officers who represent the State in the prosecutions, is also a provision for their private purposes. Counsel confuse the tax levied upon the lands and the disposition of the lands by the State after they shall have become forfeited. There is no pretense, and there can be no ground for any, that the act provides any other use of the taxes that may be derived from assessments under the act than is

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made of all other taxes imposed on all other property of the State and its counties. But if the assessments are not made because of the contumacy of the property holder or claimant, and thereby a forfeiture of his title results, then it is not material to him what becomes of the title which has been vested in the State. There is nothing in the Constitution which prohibits the State's conferring the title upon whom it pleases, and of disposing of it in any manner its Legislature may elect to do. The forfeiture is not a tax. Nor is it the equivalent. It is a penalty imposed for a violation of a statute. Like other penalties, it is the subject of legislative control and disposal, without regard to the previous title or ownership of the convicted violator of the law.

Fourth. It is contended that the act violates section 51 of the Constitution, which requires that every legislative act shall relate to but one subject, which shall be expressed in its title. The title to the act is "An act relating to revenue and taxation." If this article is bad for the reason last assigned, then much, if not most, of the existing revenue law of the State must fall for the same reason. A great many analogous instances might be cited from that act. But we will confine ourselves to a few. Railroads and other public service corporations are required to report certain information upon which their assessments are to be based by the State board of valuation and assessment. Their failure is penalized by fine of from $50 to $1,000 and a suspension of the corporate franchise. Similar penalties were upheld, and a like act declared constitutional, in Louisville & Jeffersonville Ferry Co. v. Commonwealth, 104 Ky. 726, 20 Ky. Law Rep. 927, 47 S. W. 877. Distillers are required to furnish certain detailed reports, under a penalty

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for failure of from $100 and $500 a day. Acts 1906, p. 193, c. 22, art. 12, sec. 1, subd. 4. Liquor dealers are licensed, with elaborate procedure for obtaining license and for their revocation. In a similar statute a provision for licensing peddlers required that all notes taken by them should be indorsed, "Peddler's Note," or be void. The law was upheld as constitutional, although the question of the sufficiency of the title does not seem to have been raised. Hays v. Commonwealth, 107 Ky. 655, 21 Ky. Law Rep. 1482, 55 S. W. 425. This same act provides for a State board of equalization, their appointment, duties, and compensation; for a county board of supervisors, their appointment, duties, and compensation; and likewise for the appointment of auditor's agents. All these matters are germane to the title "Revenue and Taxation," which is the subject of the act.

The last Constitution contained a similar provision to section 51 of the present Constitution. Under it, and, indeed, since the foundation of the Commonwealth, legislation has been enacted under precisely the same or equivalent title, in which equally as wide range of treatment has been indulged as in this act. In Phillips v. Cin. & Cov. Bridge Co., 2 Metc. 19, this court, commenting on that constitutional provision, says: "It should not be so construed as to restrict legislation to such an extent as to render a different act necessary, where the whole subject-matter is connected and may be properly embraced in the same act." And further: "None of the provisions of a statute should be regarded as unconstitutional, where they all relate directly or indirectly to the same subject, have a natural connection, and not foreign to the subject expressed in its title." In L. & O. Turnpike Co. v. Ballard, 2 Met. 165, it was said: "A more lib-

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eral construction of this clause of the Constitution will be not only more consistent with the objects intended to be accomplished by it, but will be found necessary in the practical business of legislation." Hoke v. Commonwealth, 79 Ky. 567, 3 Ky. Law Rep. 407; Chiles v. Drake, 2 Metc. 146, 74 Am. Dec. 406; Jacobs v. Louisville & Nashville R. R. Co., 10 Bush, 263; Conley v. Commonwealth, 98 Ky. 125, 10 Ky. Law Rep. 873, 32 S. W. 285; Weber v. Commonwealth, 72 S. W. 30, 24 Ky. Law Rep. 1726; Hyser v. Commonwealth, 116 Ky. 415, 76 S. W. 174, 25 Ky. Law Rep. 608; Sutherland's Stat. Constr., sec. 93; Cooley's Constitutional Limitations, sec. 145. Not only is every feature of article 3 above logically connected, but the whole naturally pertains primarily to the subject of revenue and taxation. Besides, the subject has from the beginning in this State, and prior and since in Virginia, been treated as embracing the identical features now brought forward, so that if any one concerned in such legislation, whether a member of the assembly or a landowner looking out for his interests, would naturally have expected to find such legislation under that title, and reasonably all that was germane to the subject treated under the one head.

One complaint is that the measure is really not one of revenue, but of police, and that, therefore, it is not germane to the title. There will be found in this general act many features which partake of police regulation, as well as of revenue. This is particularly true of the most of the article devoted to license, such as liquor licenses, peddlers, pawnbrokers, billiard tables, pool rooms, exhibitions of circuses, and the like. Such measures might without any impropriety have been classed under either head, as they

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truly pertain to each as they are treated of. On this subject Judge Cooley (Cooley on Taxation [2d Ed.] section 587) says: "It has been seen that other considerations than those which regard the production of a revenue are admissible, and that regulation may be kept in view when revenue is the main and primary purpose. The right of any sovereignty to look beyond the immediate purpose to the general effect neither is nor can be disputed. The government has the general authority to raise revenue, and to choose the methods of doing so. It has also general authority over the regulation of relative rights, privileges, and duties, and there is no rule of reason or policy in government which can require the Legislature, when making laws with one object in view, to exclude carefully from its attention the other." The primary purpose of article 3 is to raise revenue. Its incidental purpose is to regulate other rights. Also incident is the disposal of that which, in default of the revenue sought, shall come to the State by way of penalties. As they will in such event belong to the State, to dispose of them in that way that will most redound to the public welfare, as the Legislature shall judge, is a logical continuation of the same general subject of legislation. That the Legislature has the power to so dispose of what may be forfeited to it we have no manner of doubt, nor has there been cited to us any case or advanced any reason to the contrary.

Fifth. The act is claimed to be void, as violative of the Compact with Virginia. The Compact, so far as here involved, has already been set out in the foregoing part of this opinion. As may be naturally expected, that instrument has been before this court a number of times, as well as before the Supreme Court

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of the United States, for construction. It is conceded to be as obligatory upon this State to its fair intent as fully as if ingrafted in the Constitution of the State. Nay, more so, in that, while the State might alter or abrogate provisions of its own Constitution, it is without power to either alter or ignore the Compact. Green v. Biddle, 8 Wheat. 1, 5 L. Ed. 547; Lessee of Joseph Marlatt v. Silk, 11 Pet. (U. S. 1, 9 L. Ed. 609; Poindexter v. Greenbow, 114 U. S. 271, 5 Sup. Ct. 903, 29 L. Ed. 185. Among the first authoritative attempts on the part of this court to construe the Compact was Boone v. Helm, 4 Dana 403, although it had been discussed, indicating the views of certain of the judges, in Hoys' Heirs v. McMurry, 1 Litt. 365, and in Beard v. Smith ,6 T. B. Mon. 430..

In Boone v. Helm, this court, speaking through Chief Justice Robertson, respecting the clauses of the Compact now in question, said: "All these expressions, taken together, mean, even according to their literal import, this, and only this: That, as to the validity and effect of such claims to land as then existed under the Virginia land system for the district of Kentucky, the rights of the claimants, as then existing, whether perfect or inchoate, should be tested by the laws under which they had been acquired, and that Kentucky should not abolish those laws, or enact and enforce any statute destructive of the validity of such of those claims as were, according to the laws existing when they were acquired, valid and available. Then, if any such claimant had a good entry, it—that is, the entry—should ever remain good as a valid and legal location. If he had a survey, good according to the law under which it was made, it—that is, the survey—should continue to be held as

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having been, when made, legal and valid. If he had obtained a patent, it—that is, the patent—should be deemed, in the courts of Kentucky, to have vested in the patentee all the rights which were guaranteed by the laws of Virginia existing when it was issued. And if, at the time of the separation, one claimant had a perfect and another an imperfect title to the same land, each according to its degree valid and legal, both shall ever be held, in the like manner, to have been then good, and neither of them shall ever be invalidated by Kentucky. This seems to us to be the utmost latitude of the literal and intrinsic meaning of the Compact. And it does not interdict prospective legislation by Kentucky, for perfecting any imperfect title which was good, in its degree, at the date of the Compact, or of the separation, or for maintaining her own just authority as a sovereign, in procuring revenue, giving proper repose to honest occupants, preventing vexatious litigation, or in enacting and upholding, prospectively, any other just system of public economy, which Virginia herself might have adopted without rendering by retroaction, that invalid which was valid under her laws. It is admitted in argument, and could not be plausibly denied, that prospective limitation and revenue laws, by Kentucky, affecting rights to land acquired from Virginia, are not interdicted by the Compact."

In Kendall v. Slaughter, 1 A. K. Marsh. 378, involving the power of this State to change its limitation laws so as to give a shorter time than Virginia did at the separation for bringing actions, this court said: "But whilst the legislative enactments of this country are by the Compact not permitted to affect the validity of those rights, we are of opinion that instrument should not be construed so as to preclude the Legisla-

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ture from either regulating the mode of action, or limiting the time it should be prosecuted, for the purpose of asserting those rights. That the section alluded to was not understood by the parties to that Compact as inhibiting the Legislature from passing laws by which those rights might become forfeited is, we apprehend, apparent from other parts of that instrument; for it is furthermore in the latter clause of the eighth section provided that 'no neglect of cultivation or improvement of any land, within either the proposed State or that of Virginia, belonging to the nonresident citizens of the other, shall subject such nonresident to forfeiture or other penalty, within the term of six years,' etc. * * * If, then, notwithstanding the Compact, laws of forfeiture may be enacted, no reason is perceived why the Legislature should not be allowed to regulate the limitation of actions; for, although possession may, in process of time, ripen into a perfect right to the land, it does so, under the efficacy of the laws of limitation, operating in the nature of a forfeiture upon the failure of the claimants in not asserting the right in due time."

These views are fully sustained by the Supreme Court of the United States in Hawkins v. Barney, 5 Pet. (U. S.) 457, 8 L. Ed. 190. This action also involved the validity of a 7-year statute of limitation passed by Kentucky, and applied to a claimant under a Virginia grant, whereas the period of limitation in Virginia applicable to such actions at the time of the separation was 20 years. That court commenting upon the Compact, said: "It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage.

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* * * Let the language of the Compact be literally applied, and we have the anomaly presented of a sovereign State governed by the laws of another sovereign; of one-half the territory of a sovereign State hopelessly and forever subjected to the laws of another State. If the seventh article of the Compact can be construed so as to make the limitation act of Virginia perpetual and unrepealable in Kentucky, then I know not on what principle the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and in fact every law applicable to real estate. * * * The last member of the eighth article of this Compact distinctly recognizes the existence of the power in Kentucky to pass similar laws, notwithstanding the restriction of the seventh article, and also the probability of her resorting to the policy of such laws."

No one seems to have thought before that the power of the sovereign State of Kentucky was, or was intended to be, curtailed by the Compact with Virginia respecting the right of the former to proceed in her own way to coerce taxes from all property within her dominion for her support. The right to levy and collect taxes from the citizens or property within its jurisdiction is inherent in a State. As a part of its coercive process, it may forfeit the title of recusant taxpayers, or distrain their property without judge or jury. The Compact no more prevents the State from forfeiting the title of property whose owners refuse to list it and pay taxes upon it than it denies to this State the power to levy the taxes. Nor does the Compact affect at all the question of procedure, jurisdiction of courts, the subsequent devolution of the title, requirements as to registry of subsequent conveyances, or the future duties and

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obligations to the State of the owners of such titles. The cases examined comment upon the fact, and lay stress upon the point, that whatever Virginia herself could have done in subsequent legislation, as affecting the titles in question, Kentucky might also do. As we have seen, Virginia, at the time of the separation, had provided for a forfeiture of titles for a failure to pay the tax for three years, and has continuously since enacted such legislation. It was not a violation of the Compact for Kentucky to enact the statute in question. It does not in the least impair or affect the validity of the patents issued by Virginia or under Virginia surveys, nor does it alter the right of any holder of such patents that was acquired under the laws of Virginia. They took the patents subject to the right and power of the sovereign to compel the payment of taxes on the land in the future, and subject to the correlative power in the sovereign to forfeit the titles to the State as a penalty for the nonpayment of the taxes.

Sixth. It is contended by appellant that the act in question is vicious because it seeks to extort an unlawful duplicate tax upon the same land. In the petitions of appellant is this paragraph: "Your petitioner is advised by counsel, learned in the law, and believes, that in all of said years, and now, under the laws of the Commonwealth of Kentucky, whenever the occupant or occupants of any part or parts of any of said tracts have paid the taxes thereon, which those under whom your petitioner claims ought to have paid or ought to pay, the person so paying the tax shall be entitled to recover of the owner the amount of the tax so paid and interest, which shall continue a lien on the property upon which such tax was paid." The laws of the Commonwealth referred to in the

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foregoing statement of the petitions are as follows: "Any person having a lien on property upon which the owner has failed to pay the taxes, and has become delinquent, such lien holder may pay the taxes, interest and penalties thereon, and shall be subrogated to the lien of the Commonwealth, county or district therefor, and the sum so paid shall bear legal interest from the date of payment, and shall be collectible in the same manner as the original claim of the lien holder." "Wherever the occupant or tenant of any land, or bailee or person in possession of any personal property, shall pay the tax thereon which the owner ought to pay, the person paying the tax shall be entitled to recover of the owner the amount of the tax so paid and interest, which shall constitute a lien on the property upon which such tax was paid." Ky. Stats. 1903, sections 4032, 4033, continued in force by Act March 15, 1906, article 1, sections 14, 15, and Acts 1906, p. 92, c. 22.

There is no such connection or privity between adverse claimants of land as entitles one to recover taxes voluntarily paid by him on the land, although he in fact did not own it, from another who did own it, but failed to list it and pay the taxes. That which the State taxes is the property of the claimant—not the land. The right to possess, the title or legal title of dominion, is the property which the law protects, and is that property which it taxes. If two persons claim the same land, each having a title, but undetermined which is superior, shall the State stand back until their dispute is settled before it can exact a tax from the owners? For if one of them can lawfully refuse to list his claim, which is his estate in the land, then the other could also. The State creates property—that is, the right to a thing—by protecting

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its use and enjoyment. It maintains police to protect its security and that of its owner, courts in which his rights may be vindicated, and the whole fabric of social government, which gives all value to every kind of property. In return, the State exacts certain personal services from the citizen, and in addition a sum at certain intervals, called a "tax," with which to defray the expenses of the government which he enjoys and which protects him in his rights of property. The State, then, may tax whatever is property within its jurisdiction. If one has an imperfect title to land, that is property, and it may be taxed. although another have a more perfect claim to the same land, which is also taxed as his property. That is not double taxation. There are many instances in which the same tangible thing supports several separate properties. For example, a corporate franchise is taxed; so is the property which is used in connection with it, and without which the franchise would have no appreciable value. Lands owned by corporations may be taxed: that is, the corporation's dominion and right in them. Based upon the land, the corporation issued shares to its stockholders. These shares, mere intangible things, may also be taxed against the shareholders. Nor would that be double taxation, though it might be impolitic. A debt is taxable as the property of the creditor. That for which the debt was created, if property, is also taxed as the property of the debtor.

The act of 1906 provides: "It shall be the duty of each and every owner or claimant of land to pay all the taxes * * * and to list said land * * * for taxation." It also provides: "The fact that said land has been listed for taxation, or the taxes have been paid thereon by another claimant, shall not

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relieve against the duty therein imposed." Laws 1906, pp. 115, 116, c. 22, art. 3, section 1. The provision existed under the General Statutes. Gen. Stats. p. 1036, c. 92, art. 1, section 8. Double taxation is not per se unconstitutional. It is only when taxes are imposed twice by the same government upon the same property as against the same owner that they are inhibited, and then only by virtue of the clause in the Constitution which requires all taxation to be uniform. It is only when there is a destruction of uniformity by virtue of the so-called double taxation that it is prohibited. The State is interested, not only in having its taxes paid to it, but in having them paid by the persons who ought to pay them. The fact that the State makes a claimant in possession, though not having the best title, pay taxes upon his property—that is, his claim—does not exhaust the State's power to compel any other claimant of a title to the same land to list his claim and pay taxes upon it. The statutes quoted above, and relied on by appellant, at the utmost would not give a claimant of land who paid taxes on it a lien as against the true owner, if the latter also paid. When the Legislature requires the true owner to list and to pay taxes on his claim, it is therefore no defense under this statute that another (a stranger to the title) has listed the land and paid the taxes, and would have a right of action to recover for them if the State did not collect them from the true owner. Simpson v. Edmiston, 23 W. Va. 675.

Seventh. The act is claimed to infringe both the federal and State Constitutions, in that it attempts, so it is argued for appellant, to deprive citizens of their property without due process of law. This proposition involves the power of the State to forfeit lands of the owner or claimant because he failed to

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list or pay taxes on them. The power of the State to levy the tax is not to be questioned. No more is its power to coerce its payment. As listing the property for assessment is a necessary step towards collecting the tax, the State must have as ample power to compel that step as any other in the process of collecting the tax, or its whole power in the premises is reduced to the strength of the weakest incident. It is no longer controverted that the State may distrain the delinquent's property—may sell it by the most summary proceeding. No judicial action is necessary to perfect the title. "In what important particular does this differ from the case of forfeitures," says Judge Cooley in his work on Taxation (page 464), "except that to the proceedings which are to work the forfeiture there is added the one requirement of a public sale? But there are in the sale no elements of an adjudication. It does not stand in the place of one. Its purpose is only to bring to the public treasury the tax for which the sale is made. Incidentally in the proceedings a purpose is kept in view not to sacrifice any further than shall be necessary the interests of the owner; and to this end notice of the sale is required, with a view to invite competition among bidders. But we are not aware of any constitutional principle that entitles a party to have his duty coerced by a public sale of property rather than by a forfeiture of it. A sale by a ministerial officer, which, as the closing step in administrative action, is to divest the owner of his title, is as much obnoxious to the charge that it deprives him of his freehold without a hearing, as is the legislative forfeiture."

That text was written before the opinion of the Supreme Court in King v. Mullins, supra, in which,

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in summing up on the West Virginia Constitution and statutes already noticed, the court said: "We hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the State by reason of the owner not having them placed or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representative of the State in the proper circuit court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the Constitution of the State." This court, in Marshall v. McDaniel, 12 Bush, at page 383, said that it was within the power of the State to provide for a forfeiture of the owner's title if he should fail to list or pay taxes on his land; but it was held in that case that before the forfeiture could become effective he must have an opportunity to be heard in the matter before some competent tribunal to try the question—not whether it was right that his title should be forfeited, but whether the facts existed which under the statute worked a forfeiture. So in Harris v. Wood, 6 T. B. Mon. 643, this court held that the State was not required, in collecting its taxes, to submit the question of right or of the taxpayer's liability to a judicial tribunal or to a jury; that such had never been the law of the land. Under the act here involved, the owner is given a day in court. His title does not become forfeited till it is so adjudged in an action

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in the circuit court, to which he is made a party, and is summoned if within the court's jurisdiction, or proceeded against regularly by publication otherwise, and a regular trial is or may be had. The inquiry would be, in the trial, did he fail to list or pay the taxes within the time and in the manner prescribed by the statute? If he did fail, then the judgment will carry into effect the legislative fiat that his title shall be forfeited to the State. If he did not fail, then the proceeding to forfeit will be dismissed, and he will be left with his title as it was before.

In this connection we will notice another objection made against the statute, which is that it is an ex post facto law; that it punishes an act or omission by forfeiture of property which, when the act was omitted, was not so punishable by law. But such is not the fact. It is not the failure to list in the years 1901, 1902, 1903, 1904, and 1905 that works the forfeiture; but it is the failure after the passage of the act in 1906 to thereafter list the property for the five years named, and before January 1, 1907. It was within the power of the Legislature to forfeit for even one year's omission.

Eighth. It is assumed in argument against the validity of the act that any retrospective statute is unconstitutional. But such is not the law. The Legislature may provide for retrospective assessment of property, and, if it has been omitted, ought to do so (Levy v. City of Louisville, 97 Ky. 394, 30 S. W. 973, 16 Ky. Law Rep. 872, 28 L. R. A. 480), as otherwise such property would enjoy an exemption to which it was not entitled, and thereby impose an additional and unjust burden upon other taxpayers. There is nothing in our Constitution which prohibits retrospective taxation. Nor is there in the federal

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Constitution. Florida Central R. R. Co. v. Reynolds, 183 U. S. 471, 22 Sup. Ct. 176, 46 L. Ed. 283. The only inquiry is, has the Legislature clearly indicated its purpose to tax the property retrospectively? Durrett v. Davidson, 93 S. W. 25, 8 L. R. A. (N. S.) 540, 20 Ky. Law Rep. 401. Under the language of this act there can be no doubt of such purpose.

Ninth. There are a number of other objections made to the statute by appellant, all of which may be grouped under the general complaint that it is harsh, oppressive, and unjust. Were these objections well grounded, they would afford no basis for relief at the hands of the court. The policy of the Legislature may be looked into by the courts for the purpose only of interpreting statutes. If, then, they are found to be within the power of the Legislature to enact, the business of the court is ended. That the Legislature saw proper to enact a harsher remedy than it might have done; that it allowed the minimum of grace to the taxpayer; that it imposed most onerous penalties for his defaults; that it imposed even greater penalties than it does as against other classes whose fault may be no greater; that it does not even excuse infants, or married women, or persons laboring under disability, when the general policy of legislation is to deal more indulgently with those classes—are all considerations of expediency which appeal to the good sense and the conscience of the legislators. It is not tolerable in our form of government, with its distinct separation of powers, that acts of the legislative branch should stand or fall according as they appealed to the approval of the judiciary; else one branch of government, and that the most representative of the people, would be destroyed, or at least completely subverted to the judges. We do not say

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that this act is to be regarded, in the light of the history of its enactment and the abuses it was intended to remedy, as falling within the category described. There is abundant basis for the act, in which it will appear, not only as reasonable, but as highly politic. All that we do mean to say is that, tested by precedent and principle, we are unable to find that it violates any provision of the Constitution of the United States or of this State, or in any wise transcends the power of the legislative department of the State government.

Finally. Did appellant comply with the statute, so that the county court ought to have listed the lands? The petitions in these cases contained the same averment, of which the Pike county case is selected as a sample, as follows: "You petitioner claims to be an owner of the herein below described tracts of land, situated in the county of Pike, State of Kentucky, but not of the improvements thereon, nor of the surface of certain parts of each tract as hereinafter stated, to-wit." Then follows a description of land by calls and distances, which it may be assumed were sufficiently explicit to have located the several boundaries. The petition sets out the dates of issue and serial numbers of the patents, and the instruments through which the petitioner derived title, namely, unrecorded deeds from Charles B. Hillhouse, and that the title of Hillhouse was derived by deeds and contracts to convey made by him with "others claiming by inheritance, by divers mesne conveyances, from those to whom said tracts of land respectively were granted by letters patent." The petition then states that the lands had not been assessed for any of the years 1901 to 1905, both inclusive, either by the petitioner or by any one under whom it derived title, and

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that no part of the taxes for any of those years had been paid. But the petitions alleged that parts of each of said tracts had been listed for taxation for each of said years by others than the plaintiff and those under whom it claimed, and that taxes under this listing have been paid by strangers. The petition then continues: "Your petitioner does not claim to be the owner of any improvements on any of said tracts of land, nor of so much of the surface of said lands as has been adversely held by others for a period sufficient to toll your petitioner's right of entry."

The defects of these petitions are: (1) They do not disclose the names of the owners, and therefore do not show the proper persons to be assessed. They show that appellant is only "an owner." Of what part, or in what proportions, and by whom the remaining portions are owned, is not shown. (2) They do not "so describe the land proposed to be assessed" as that, in the language of the statute, "it can be identified"—the land to be assessed in not only specific tracts, so described in their entirety as to be susceptible of accurate location, but the interest of the listing owner, if he owns less than the entire tract, must be so described as that it may be identified. (3) Some of the patent boundaries described lie only partly in the county wherein it is proposed to list it. The petitions show that fact, but do not show where, in what part of the county, the parts to be assessed do lie; nor do they show where the excluded parts which it is admitted do not belong to the petitioner lie, so as that the court could with reasonable certainty and intelligence fix a valuation upon that part which is assessed. For lands which lay upon the main Big Sandy river, in Pike county, would have

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a much greater cash value than if they lay across a mountain range miles away from a navigable river or a railroad. If the claimant does not own the whole tract described, he must show what portion he does own or claim. A failure to so describe exclusions as that they may be identified leaves the description as indefinite as if the original tract could not be identified.

Nor are these objections merely technical, interposed whimsically, so as to defeat the proposed listing of the land, and so as to work its forfeiture. They are each substantial, and have solid merit to support them. Only the title of the person assesed passes by a tax sale. Johnson v. McIntyre, 1 Bibb, 295. If lands are assessed in the name of the wrong persons, no title passes by the tax sale. Wheeler v. Brammel, 8 S. W. 199, 10 Ky. Law Rep. 301; Spalding v. Thompson, 30 S. W. 20, 16 Ky. Law Rep. 836. The listing of partnership property in the name of an individual member of the firm is invalid to pass the partnership property under tax sale. Furguson v. Clark, 52 S. W. 964, 21 Ky. Law Rep. 697. A tax deed for 100 acres of 600 acres was held void in Humphries v. Huffman, 33 Ohio St. 395. The description in the deed must be one that identifies the land with reasonable certainty. Cooley on Taxation, 516; Gooch v. Benge, 90 Ky. 393, 12 Ky. Law Rep. 368, 14 S. W. 375. In the last-named case it was held that the description in the sheriff's deed must be so accurate as to "enable the officer selling it and those disposed to purchase to find it and ascertain the character of it by the description given." The description in the deed and the assessment roll must agree, or the title fails to pass. Carlisle v. Cassidy, 20 Ky. Law Rep. 562, 46 S. W. 490. A sale for taxes that

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have been paid is void. Therefore it is of the first consequence that the assessment should be such as that, if the lands were sold under it, the title of the taxpayer would pass; otherwise, no one would be justified in bidding at the sale, and the State would get none of its taxes in spite of its efforts. Furthermore, if the taxpayer did not pay within the time fixed in the statute, and the State or county elected to forfeit his title, if the assessment was ineffectual, the proceding to forfeit must fall by the way. As the nonresident may not be reached otherwise for the tax than by the proceeding in rem, it is competent and necessary for the State to have in the first instance such an adequate list as will satisfy every requirement of the law as to passing a valid title if a sale or forfeiture of the land should be necessary to realize the tax. Commonwealth v. Tobacco Company, 107 Ky. 1, 21 Ky. Law Rep. 573, 52 S. W. 799. The purpose of the Legislature was to enforce, under the extreme penalty of forfeiture for failure, such a listing of the property as would in the future prevent its escape from taxation, as it had been enabled to do in the past because of statutes so loosely drawn as that no title would pass in case of default; and as the owner was a nonresident, or might be, a penalty of a fine would be wholly inadequate to secure the listing, as, owing to his absence from the State, jurisdiction could not be obtained to assess the fine in a criminal or penal action. An assessment under the offer made by appellant would not have enabled the State to sell any particular piece of land, or any particular interest in any particular parcel, so as to pass the title of appellant and the others claiming with it. The petition was so vague and indefinite as to utterly fail to meet the requirements of the statute. It does

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not answer to say that the taxpayer did not know his property or its description. He is required to know it, and to furnish it, so as the property may be certainly identified from it; nor is it an answer to say that it would be too expensive for him to make the necessary investigation.

Wherefore we conclude that the county courts were right in refusing the lists, and the circuit courts' judgments so holding are each affirmed.

DISSENTING OPINION BY JUDGE HOBSON—

When an act is not punishable under the law in existence when it is done, it cannot be made punishable by the Legislature by a law subsequently passed; and, upon like principles, where an act is punishable in a certain way when it is done, the Legislature cannot by a subsequent law add to the punishment or penalty. The Legislature cannot deny to any one the equal protection of the laws; and in my judgment article 3 of the revenue act of 1906 (Acts 1906, p. 88, c. 22) is void, both on the ground that it is ex post facto legislation, and that it denies to the holders of land titles referred to, the equal protection of the laws.

The act was approved March 15, 1906. It took effect about 90 days thereafter. The first section of the act makes the duty of every owner or claimant of land to pay all the taxes which had been assessed or should have been assessed against him, or those under whom he claims, as of the 15th day of September, 1901, 1902, 1903, 1904, and 1905; and, if it had not been assessed for any of these years, the act made it his duty to assess the land and pay the taxes, interest, and penalty therein provided for. His

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failure to do this is made a cause for the forfeiture of his title; but this forfeiture shall be extinguished if on or before March 1, 1907, he lists the land and pays the taxes, with the interest and penalties provided by law in case of the redemption of land sold for the nonpayment of taxes. When land is sold for the nonpayment of taxes, a penalty of 15 per cent. is added, and the taxes bear interest at the rate of 10 per cent. So that the meaning of the act is that the owner of land who had failed to list it for the years named must list it after the act takes effect and pay a penalty of 15 per cent., and also interest on the taxes at 10 per cent. per annum from the time he was delinquent; that is, from the time the land should have been assessed. By the law in force up to the time this act took effect the owner of land which had been omitted from assessment might voluntarily have it assessed at any time and pay taxes, without interest or penalties. If he failed to list it voluntarily, and a proceeding was instituted against him under section 4241 of the Kentucky Statutes of 1903, he was liable to a penalty of 20 per cent., which went to the officer instituting the proceeding; but, even in this case, he was not liable for interest at 10 per cent. on the taxes, and if he made the assessment voluntarily, without a proceeding being instituted against him, he was not liable for the penalty of 20 per cent. While the act gives him until March 1, 1907, to list his property and pay the taxes, from the moment the act took effect the only way that he could escape the forfeiture of his title was to pay not only the taxes, but the interest and penalty. The act does not give him a certain length of time to list his propery, and provide that if he fails to list within that time he shall be subject to the penalty; but it imposed the penalty

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upon all who are delinquent in listing their land and who would escape the forfeiture of their title by listing it after the act takes effect.

It is said that so much of the act as imposes the penalty for the past delinquency may be rejected, and that the balance of the act may stand; but this is not a case in which that rule can be applied, for the reason that the act forfeits the title of all persons who had failed to list their land for the years named, and the only way in which they can escape the forfeiture is by paying the taxes, with interest and penalty. If they do not pay the taxes, interest, and penalty, the forfeiture stands. If that part of the act which provides for the extinguishment of the forfeiture is invalid, then there is no way in which the owner can escape the forfeiture. Besides, this is an essential part of the whole scheme of the act, and it cannot be presumed that the Legislature would have passed the act without this. The forfeiture of the titles of the owners is the purpose of the act. There would not be a clearer case of legislative intention to punish retrospectively. By the general law the person owning land at the time it should be assessed is not only liable for the taxes, but remains bound therefor; by this article the present owner's land is forfeited to the Commonwealth for the nonpayment of taxes by the former owner. By the general law, if the occupant of land pays the taxes thereon, he is entitled to recover of the owner the amount so paid, with interest, and has a lien on the land therefor; by this article the fact that the land has been listed for taxation and the taxes paid by the occupant does not prevent the forfeiture as therein set out. By the general law land may be assessed retrospectively at any time not later than five years, but not to prejudice the rights

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of purchasers acquired in the meantime; by this article the purchaser is required to pay the taxes, with interest and penalty. By the general law, if the owner sells the land after the 1st of February of the year in which the taxes are due and payable, it is the duty of the owner to pay the taxes; by this article the purchaser's title is forfeited if he does not pay them. By the general law, where property has been sold for taxes, the owner may redeem it within two years; by this article the owner forfeits his title to the land if he fails to assess it and pay the taxes thereon as therein provided. By the general law, if the owner fails to assess his property, it may be assessed retrospectively, but the taxes are then collected as other taxes; by this article the taxes are not collected as other taxes, but must be paid at once, with interest and penalties, to avoid a forfeiture of the title. By section 4 of this article, before the defendant may redeem, he must pay, not only the amount of unpaid taxes charged, but those that ought to have been charged against those under whom he claims for 50 years preceding the filing of the counterclaim. No such provision is found in the general law relating to other property, and there is no provision in the general law for double taxation of the same property, and the payment of the taxes by each claimant where there are two claimants to it.

A reading of the article shows that it was a deliberate attempt on the part of the Legislature to deny the equal protection of the laws to the owners of the land titles referred to, and to provide as to the holders of these land titles an entirely different system from that provided for the holders of other species of property. It is therefor, in my judgment, void

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both under the Constitution of this State and the Constitution of the United States.

For these reasons, I dissent from the opinion of the court.

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JANUARY TERM, 1908

CASE 68.—ACTION BY A. BROOKS AGAINST RUFUS EBLEN TO SUBJECT LAND TO HIS DEBT WHICH HAD BEEN SET APART TO THE DEFENDANT AS HIS HOMESTEAD BY THE BANKRUPT COURT.—January 8, 1908.

Brooks v. Eblen, &c.

Appeal from Henderson Circuit Court.

J. W. HENSON, Circuit Judge.

From the judgment defendant appeals—Affirmed.

1. Bankruptcy—Exemptions.—The court of bankruptcy has no jurisdiction of exempt property, except to set it aside to the bankrupt, and the rights of creditors to subject the same to their debts must be determined in the State court.
2. Same—Discharge in Bankruptcy—Effect.—A creditor having no lien at the time of the debtor's discharge in bankruptcy can not subject to his debt land acquired by the debtor after the creation of the debt, occupied by him as his residence, and set aside by the bankruptcy court as exempt.

ROBERT D. VANCE for appellant.

JOHN F. LOCKETT of counsel.

PROPOSITIONS DISCUSSED.

1. Under the Ky. Stats., land purchased subsequently to the creation of a debt is not exempt as to that debt, as a homestead. (Ky. Stats., section 1702.)

2. Under the bankrupt law, now in force, title to exempted

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property does not pass to the trustee in bankruptcy. (Section 6, Bankrupt Act, 1898; In re Hester, 5 N. B. R., 285; Wilkerson v. Wart, 44 Vt., 508; In re Hester, 5 N. B. R., 285; In re Hunt, 5 N. B. R., 493; Bush v. Lester, 15 N. B. R., 86; Felker v. Crane, 70 Ga., 484.)

3. A discharge in bankruptcy releases a debtor from personal liability, but it in no way affects a lien or claim against property exempt from execution and exempt from distribution among general creditors. And any court of competent jurisdiction can enforce said lien or claim against said property after said discharge in bankruptcy, where no disposition is made of said property by the bankrupt court, except to approve of the trustee's report setting aside same as exempt under the laws of Kentucky. (In re Camp et al., 91 Fed., 745; In re Hill et al., 96 Fed., 185; In re Hitch, 102 Fed., 280; In re Black, 104 Fed., 289; Payne & Bro. v. Able, 7 Bush, 344; Second Nat'l Bank of Louisville v. Nat'l Bank of New Jersey, 10 Bush, 367; 5 Cyc., 403 and notes; Scott v. Elbery, 142 U. S., 381; Fetter & Co. v. Cirods, 4 B. Monroe, 402; Bonnet v. Salyers, 11 Ky. 465.)

4. A court of bankruptcy, as a rule, will not dispose of property encumbered to such an extent that nothing can be realized for general creditors by sale of it, but will exercise no control over it and leave it in the possession of and under the control of the bankrupt, subject to all existing liens and claims, and when this is done, no claim or lien against said property is affected by a discharge of debtor in bankruptcy. (5 Cyc., 333 and notes; In re Cogley, 107 Fed., 73; In re Dillard, 2 Hughes (U. S.), 190.)

LOCKETT & WORSHAM for appellees.

POINTS AND AUTHORITIES.

1. Appellant's petition on a note for $53.80 was dismissed at his cost. This court has no jurisdiction on the appeal.

2. The plea of a discharge in bankruptcy of appellee Rufus Eblen from this note, not being questioned in the reply, the dismissal was proper.

3. The fact that Rufus Eblen's homestead was not exempt from this debt does not create a lien upon the homestead, and the suit to collect said note does not invlove the title to real estate so as to authorize an appeal from the judgment dismissing the suit.

4. Admitting that the homestead bought after giving the note was not exempt from sale under execution upon a judgment on said note, still that fact gives no lien upon the homestead, but

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leaves the homestead subject to this debt to the same extent, and no more, that the debtor's other property subject to execution is liable to his general creditors.

5. The cases cited by appellant that exempted property does not vest in the trustee in bankruptcy do not reach the question to be decided.

6th. When the discharge in bankruptcy was granted, appellant had no lien for this note and had not even begun suit for its collection, and being provable under the bankrupt law the debtor was released. (Bankrupt Law, section 17.)

7. If the homestead was subject to this debt, then it did pass to the trustee, and the bankrupt court could have sold it.

8. The land was encumbered to its value by lien for the purchase money, and the trustee and appellant not questioning the lien, the property was thereby relinquished to said lien-holder.

9. But this fact in no way affects the bankrupt's discharge from his provable debts.

10. Appellant was duly notified of the proceedings in bankruptcy, and his debt is extinguished.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

On February 6, 1896, Rufus Eblen executed to A. Brooks his promissory note. On October 20, 1902, Eblen purchased a tract of land upon which he resided with his family. On September 6, 1904, he was adjudged a bankrupt, and on November 12, 1904, he received a discharge in bankruptcy from all his debts. The tract of land referred to was set apart in the bankruptcy proceding as his homestead. On November 14, 1905, Brooks filed this suit in the Henderson circuit court against Eblen, in which he set up the foregoing facts and sought to subject the tract of land to his debt on the ground that it was purchased after his debt was created. Eblen relied upon his discharge in bankruptcy, the circuit court sustained the defense, and Brooks appeals.

As Brooks' debt was created before the purchase

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of the homestead, he may subject it to his debt in this proceeding, unless he is barred of that right by the discharge of the debtor in bankruptcy. Exempt property is never in the court of bankruptcy. The title to it remains in the bankrupt. The court of bankruptcy has no jurisdiction of it, except to set it aside to the bankrupt. All questions as to the rights of creditors to subject such property must be determined in the State courts of competent jurisdiction. Brandenburg on Bankruptcy, section 185. In the case of Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, it was held by the United States Supreme Court that a creditor holding a note which waived the homestead could not subject the homestead in the bankruptcy proceedings, but that the bankruptcy court should postpone the discharge of the bankrupt for a reasonable time to allow the creditor to institute in the State court such proceedings as were necessary to make effective the creditor's rights; and in that case the judgment of the circuit court was reversed, with directions to it to confirm the assignment of the homestead and to withold the discharge of the bankrupt until a reasonable time had elapsed for the excepting creditor to assert his rights in a State tribunal. We regard that case as conclusive here, as we cannot assume that the supreme court would have directed the discharge of the bankrupt to be withheld unless in its opinion the discharge of the bankrupt would have been a bar to the creditor's proceeding in the State court.

In Powers Dry Goods Co. v. Nelson, 10 N D. 580, 88 N. W. 703, 58 L. R. A. 770, before the bankrupt was discharged, and after the proceeding in bankruptcy was begun, the creditor took out an attachment, which was levied upon exempt property. It

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was held that the subsequent discharge of the debtor did not discharge the lien created by the attachment, and that the property might be thereafter subjected, although the debtor had been afterwards discharged in bankruptcy. In McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433, the creditor had a judgment lien upon the property, and the debtor was adjudged a bankrupt; in Bell v. Dawson Co., 120 Ga. 628, 48 S. E. 150, the creditor began his suit in the State court and had the property placed in the hands of a receiver, while the bankruptcy court had held up the debtor's discharge in bankruptcy. In Flint v. Chaloupa (Neb.) 111 N. W. 465, the creditor had brought his suit to set aside a fraudulent conveyance a year before the debtor was adjudged a bankrupt. Adjudication in bankruptcy and the discharge of the debtor from his debts by the bankruptcy court do not affect the liens of creditors, except as provided by the bankrupt act. But here the creditor had no lien when the debtor was discharged. He simply had a debt as to which certain property was not exempt which was exempt as to other debts created after its purchase. The question of exemptions was necessarily incidental to the existence of the debt, and, when the debt was discharged before any lien had been acquired on the property, the right to enforce the debt was lost.

Judgment affirmed.

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CASE 69.—PERSONAL INJURY ACTION BY HARRY BROWN AGAINST THE LOUISVILLE & NASHVILLE R. R. CO.—January 9.

127 732
137 746

Louisville & N. R. R. Co. v. Brown

Appeal from Hopkins Circuit Court.

J. F. GORDON, Circuit Judge.

Judgment for plaintiff, defendant appeals—Reversed.

1. Master and Servant—Railway Trainmen—Gross Negligence.—It was grossly negligent towards those on an approaching train for the engineer and conductor of a work train to permit it to stand on a main track on the other train's time, though the engineer directed the brakeman to flag such other train; the brakeman's failure to do so being also gross negligence.
2. Same—Fellow Servants.—The engineer, conductor, and brakeman of a train, which they negligently permitted to stand on a main track on another train's time, were not fellow servants of a brakeman on the other train, in the sense that he could not recover from the company for injuries received in the collision resulting from such negligence.
3. Same—Superior Officers.—The rule that no recovery may be had from a master for injury to a servant, not causing death, resulting from the servant's superior officer's ordinary negligence, is limited to cases in which the superior officer has immediate control of or supervision over the servant.
4. Same—Fellow Servants.—A servant may not recover from the master for injuries inflicted by the negligence of a fellow servant in the same grade of employment engaged in the same field of labor, and associated or working with the injured servant, however gross such negligence may be; but recovery may be had for the negligence of other of the master's servants, whether it be ordinary or gross.
5. Damages—Personal Injuries—Evidence—Admissibility.—In an action against a railway company for injury to plaintiff in a

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wreck, he could show mental anguish and pain suffered while pinioned in the wreck and in momentary danger of being burned to death.

6. Evidence—Photographs.—Photographs of a railway wreck, their accuracy being shown by the photographers, are admissible in evidence in an action against the company for injuries received in the wreck.

7. Damages—Personal Injuries—Excessive Verdict.—Ten thousand dollars is an excessive recovery for injury to a foot and other parts of plaintiff's body, where the injuries do not appear to be permanent, though punitive damages are allowable.

8. Appeal—Review—Damages.—The court of appeals has the same power to set aside a verdict involving punitive damages as it has where only compensation is recovered, and in every case, if the verdict appears to have been given under the influence of passion or prejudice, a new trial will be granted.

BENJAMIN D. WARFIELD for appellant.

CLIFTON J. WADDILL of counsel.

POINTS AND AUTHORITIES DISCUSSED.

1. The petition alleges that appellee's injuries were due to the gross negligence and carelessness of "the agents and servants of defendant in charge of said trains, and superior in authority to plaintiff," therefore the court erred in permitting testimony to go to the jury as to the alleged negligence of the flagman of the work train, who was the co-equal and not the superior of appellee, and in so instructing the jury as to authorize them to find for appellee on account of the negligence of the flagman. Appellee, having elected to specify wherein the negligence consisted upon which he based his claim for recovery, could not recover by showing a different character of negligence to that alleged. (L. & N. R. R. Co. v. McGary's Admr., 104 Ky., 509, 517; McCain v. L. & N. R. R. Co., 13 Ky. Law Rep., 334; Greer v. Ib., 94 Ky., 169; I. C. R. Co. v. Elliott, 26 Ky. Law Rep., 669; Howard v. C. & O. Ry. Co., 28 Ky. Law Rep., 891, and cases there cited.)

2. The court erred in striking from appellant's answer the averment that the collision in which appellee was injured was due solely to the ordinary negligence of the flagman of the work

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train. (L. & N. R. Co. v. Robinson, 4 Bush, 507; Robinson v. L. & N. R. Co., 15 Ky. Law Rep., 626; Volz v. C. & O. R. Co., 95 Ky., 188; Dana & Co. v. Blackburn, 28 Ky. Law Rep., 695; L. & N. R. Co. v. Dillard, 86 S. W., 313; L. & N. R. Co. v. Foard, 104 Ky. on p. 464.) Even if the pleadings had so authorized, there could be no recovery for the negligence of any employe of the work train unless such negligence was gross. Under the pleadings it was necessary to prove gross negligence of the conductor of the work train to authorize a recovery. There is no proof of that degree of negligence on their part.

3. The court erred in permitting the introduction of appellant's rule 99 as evidence, for the reason that the rule was only pertinent upon the question as to whether the flagman of the work train was negligent. The petition not seeking a recovery on account of the flagman's negligence, testimony on that point was irrelevant and incompetent.

4. Appellee's testimony that he believed, while under the wrecked engine, that he was in danger of being burned, as well as the testimony of other witnesses on this point, and as to the proximity to appellee of the dead fireman under the wreck, was incompetent and highly prejudicial to appellant. There can be no recovery for mental anguish not accompanied by, or traceable directly to, contemporaneous physical injury. (Morse v. C. & O. R. Co., 117 Ky., 11; Hockenhammer v. L. & E. R. Co., 24 Ky. Law Rep., 2383; Victorian Ry. Comrs. v. Coultas, 13 App. Cas., 222! Atchison, etc., R. Co. v. MvGinnis, 41 Kas., 109; Spade v. Lynn, etc., R. Co. 172 Mass. 488, 70 Am. St. Rep. 298, 168 Mass. 285, 60 Am. St. Rep. 393; Trigg v. St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. St. Rep. 305; Deming v. Chicago, etc., R. Co., 80 Mo. App., 152; Gatzow v. Beuning, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 17.)

5. The court should have submitted to the jury the issue made by the pleadings and evidence as to whether appellee was properly or improperly upon the engine at the time of the collision. The court erred in assuming as a matter of law in instructing the jury that appellee was properly on the engine.

6. The court erred to appellant's prejudice in permitting witness Shaver to testify that there was no one in the caboose of the work train at the time of the collision. Under the pleadings this testimony was immaterial.

7. The court erred to appellant's prejudice in admitting any of the evidence of appellee's witness, John Carroll.

8. The damages are grossly excessive. (South Covington & Cin. St. Ry. Co. v. Ware, 84 Ky., 267; Louisville Water Co. v.

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Upton, 18 Ky. Law Rep., 326; L. & N. R. Co. v. Mattingly, Ib. 823; Ib. v. Survant, 16 Ky. Law Rep., 349; Southern Ry. Co. v. Minogue, 90 Ky., 369; L. & N. R. Co. v. Survant, 96 Ky., 197, 208; Covington & Cin. Bridge Co. v. Goodnight, 22 Ky. Law Rep., 1242; L. & N. R. Co. v. Foley, 94 Ky., 220; Ib. v. Law, 14 Ky. Law Rep., 850; Ib. v. Lowe, 25 Ky. Law Rep., 2317; Louisville Ry. Co. v. O'Mara, Ib., 819; Watson, etc., v. Brightwell, 28 Ky. Law Rep., 887.)

9. Every person who is injured or damaged by the act or omission of another must legally do all that he reasonably can to make the injury or damage as light as possible. (John C. Lewis Co. v. Scott, 95 Ky., 484; Cain, by etc., v. L. & N. R. Co., 27 Ky. Law Rep., 201; I. C. R. Co. v. Gheen, 112 Ky., 695.)

10. The photographs were incompetent as evidence, as, also, was the testimony of J. H. Corbett, and the court erred in not excluding them from the jury.

11. The instructions were erroneous in numerous vital particulars:

(a) In authorizing appellee to recover compensatory damages for ordinary negligence when he could lawfully recover only for gross negligence, and in authorizing a recovery for the negligence of any employe connected with the work train, whereas by his pleadings appellee limited his right to recover to the gross negligence of the engineer or conductor of that train.

(b) In authorizing appellee to recover punitive damages for gross negligence, this being a common law action and not a statutory action under section 241, Ky. Constitution, and section 6, Ky. Statutes. Appellee should have been authorized to recover only compensatory damages for the gross negligence, if any, of the engineer or conductor of the work train, and should not have been authorized to recover punitive damages at all. Where gross negligence is necessary in order to recover compensatory damages, punitive damages should be allowed only where the negligence was so gross as to be wanton and as to call for punishment.

(c) In authorizing damages for the future impairment of power to earn money without requiring the jury to believe from the evidence that it was reasonably certain there would be such future impairment. (L. & N. R. Co. v. Logsdon, 114 Ky., 746, 752; Shearman & Redfield on Negligence, section 758; L. & N. R. Co. v. Hall., 115 Ky., 567; Ib. v. Fox, 11 Bush, 509; Muldraugh's Hill T. P. Co. v. Maupin, 79 Ky., 101; K. C. R. Co. v. Ackley, 87 Ky., 278; Standard Oil Co. v. Tierney, 92 Ky., 367; Parker v. Jenkins, 3 Bush, 581; L., C. & L. R. Co. v. Case, 9 Bush, 736; C. P. R. Co.

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v. Kuhn, 86 Ky., 578; Carson v. Singleton, 23 Ky. Law Rep., 1626; S. C. & C. St. Ry. Co. v. Core, decided October 3, &1906.)

(d) Instruction 3 is flagrantly erroneous in that it is made to apply only in the event appellee's injury was not, when inflicted, a permanent one. The instruction leaves out of view the probability of appellee's making his injury worse by failure to exercise ordinary care in effecting a cure. (I. C. R. Co. v. Jackson's Admr., 23 Ky. Law Rep., 1405-6.)

(e) Instructions B, C, and D offered by appellant should have been given.

SYPERT & PHILLIPS for appellee.

POINTS AND AUTHORITIES DISCUSSED.

1. The flagman of the work train was not the fellow-servant of appellee, and for the purposes of this case was the superior of appellee, and there was no error in the introduction of testimony as to the flagman's negligence, or in authorizing the jury to find for appellee for the flagman's negligence. (L. & N. R. Co. v. Edmuns' Admx. (Ky.), 64 S. W., 727; L. & N. R. Co. v. Lowe (Ky.), 66 S. W., 736; this case is cited in appellant's brief; L. & N. R. Co. v. Dillard (Tenn.), 86 S. W., 313, also cited in appellant's brief.)

2. The negligence of the flagman, in this case, was also the negligence of the engineer and conductor, and this is a further reason why the introduction of testimony and the instruction of the jury as to flagman's negligence was not improper.

3. There was no error in striking from the answer, because the flagman and the appellee were not fellow-servants.

4. There was no error in permitting testimony as to appellee's mental suffering while under the wreck.

(a) Whenever there is contemporaneous physical injury all injury and damage may be recovered. (Denver & R. G. R. Co. v. Roller (U. S. C. C. App.), 49 L. R. A., 77, 85; Tuttle v. Atlantic C. R. Co. (N. J.), 54 L. R. A., 582, 584; Sher. & Redf. on Neg., section 761, and notes 8 and 10.)

(b) This was also admissible as a part of res gestae. (Denver & R. G. R. Co. v. Roller, supra; note to Ohio & Miss. R. Co. v. Stein (Ind.), 19 L. R. A., 733.)

5. There was no evidence on which to submit to the jury the question as to whether or not appellee was improperly on the engine.

6. The damages are not excessive in this case. (L. & N. R. Co.

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v. Helm, 28 Ky. Law Rep., 603; C. & O. R. Co. v. Davis (Ky.), 58 S. W., 698; L. & N. R. Co. v. Mitchell, 8 S. W. 706, 87 Ky. 327; L. & N. R. Co. v. McEwen, 21 Ky. Law Rep., 487; Skottowe v. Or. Short Line & U. N. R. Co. (Or.), 16 L. R. A., 593, 600; Black v. Mo. Pac. R. Co. (Mo.), 72 S. W. 559; Galveston, H. & S. A. R. Co. v. Abbey (Tex.), 68 S. W., 293; also 23 L. R. A., 442, and 31 L. R. A., 855.)

7. The verdict of a jury should be taken as prima facie the result of honest judgment, and the power to set it aside should only be used in extreme cases. (Skottowe v. Or. Short Line & U. N. R. Co. (Or.), 16 L. R. A., 593, 600; L. & N. R. Co. v. Mitchell, S. W. 706, 87 Ky. 327; I. C. R. Co. v. Stewart (Ky.), 63 S. W., 596, 599; K. & I. Bridge & R. Co. v. Nuttall (Ky.), 96 S. W., 1131, 1133.)

8. The testimony shows that appellee did everything he could reasonably be expected to do to make his injury and damage as light as possible.

9. The photographs were clearly admissible in this case. (Denver & R. G. R. Co. v. Roller (U. S. C. C. App.), 49 L. R. A., 77, 89; Livermore Foundry & M. Co. v. Union Compress & S. Co. (Tenn.), 53 L. R. A., 482, 486; Mo., K. & T. Ry. Co. of Texas v. Magee (Tex.), 49 S. W. 928, 929; Elliott on Ev., vol. 2, sections 1224 to 1228.)

10. The instructions were not erroneous; they were not as favorable to appellee as he could have demanded; and they were as favorable toward appellant as could have been asked. Taken as a whole, they correctly and fairly present the law of the case.

(a) Instruction No. 2, in authorizing damages for time lost and for any impairment of power to earn money in the future and for any mental or physical pain or suffering endured is practically the same as instruction approved in Carson v. Singleton, 23 Ky. Law Rep., 1626, cited by appellant in its brief.

(b) The negligence in this case was gross, as a matter of law, and it was not necessary to particularize the degree in the instructions. (Railroad Co. v. Mahan (Ky.), 34 S. W., 16; C. & O. S. W.'s Receiver v. Hoskins (Ky.), 43 S. W., 484; L. & N. R. Co. v. Helm, 28 Ky. Law Rep., 603; I. C. R. Co. v. Stewart (Ky), 63 S. W., 596, 599; So. Ry. Co. in Ky. v. Steele, 28 Ky. Law Rep., 764, 766.)

(c). Punitive damages may be awarded an employe for gross negligence of another employe. (I. C. R. Co. v. Stewart (Ky.), 63 S. W., 596, 599; L. & N. R. Co. v. Mitchell, 87 Ky. 327, 8 S. W. 706; L. & N. R. Co. v. Moore, 83 Ky. 675.)

11. Mere numerical preponderance does not mean preponder-

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ance of evidence. (L. & N. R. Co. v. Helm, 28 Ky. Law Rep., 603; I. C. R. Co. v. Colly, 27 Ky. Law Rep. 730, 86 S. W. 536.)

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Appellee, who was a head brakeman on one of appellant's freight trains while riding in the engine, was seriously injured in a head-on collision between the engine in which he was riding and one of appellant's work trains. The work train was on the main track on the time of the freight train, and although the engineer of the work train testified that he directed a brakeman to flag the freight, and supposed he had done so, it developed that he had not, and the freight, running at a high rate of speed, had no notice that the work train was on the track until the engine was within a few feet of it, and when it was too late to stop or reduce the speed or avoid a collision. As a result of the collision, appellee was thrown under a large mass of wood and iron, and so fastened that he could not immediately be extricated. While in this position, where he remained for about an hour, the wreck caught fire, and appellee believed, and, indeed, had good reason to believe, that he would be burned to death before he could be rescued; but fortunately, before the fire reached him, he was removed from his perilous position, and escaped with severe injuries to one of his feet and some other parts of his body. He alleged in his petition to recover damages that "the agents and servants of defendant, in charge of the trains and superior in authority to plaintiff, managed and operated the trains and their crews with such gross negligence and carelessness that they came together in a head-on collision,

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whereby he sustained permanent injury and suffered great mental and physical pain." In its answer, after traversing the material averments of the petition and charging that appellee was guilty of contributory negligence, it set up in a separate paragraph that "the collision was due solely to the ordinary negligence of the flagman of the work train, who was then and there in the same field of labor and the same grade of employment as plaintiff in the employ of a common master, and was not superior in authority, but was his fellow servant." On motion of appellee this defense was stricken from the answer. Upon the trial appellee recovered a judgment for $10,000, which we are asked to reverse (1) because the trial court erred in permitting testimony to go to the jury showing the negligence of the brakeman on the work train; (2) in striking from the answer the words before mentioned; (3) in failing to instruct the jury that there could not be a recovery unless the persons in charge of the work train were guilty of gross negligence; (4) in admitting testimony of appellee and other witnesses that while under the wreck of the colliding engines he was in danger of being burned to death; (5) in allowing photographs of the scene of the collision to be introduced in evidence; (6) that the damages are grossly excessive.

We will consider the first, second, and third assignments of error together. It was the duty of the engineer and conductor in charge of the work train to know that proper measures had been taken to flag the freight or notify it that the work train was on the track. They knew the freight was due, and that they were on the main track on its time. Although the engineer testifies that he directed a brakeman to flag the freight, and supposed he had done so, his

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attempted performance of duty will not relieve the company from liability for the accident. The conductor and engineer were in control of the work train, and were charged with the duty of taking every possible precaution to see to it that timely warning was given to the approaching freight. They, as well as the brakeman, were guilty of gross negligence, although the company would be liable to appellee if they, or the brakeman alone, had only been guilty of ordinary neglect. Neither the conductor nor engineer on the work train, or the brakeman who participated in their negligence and equally with them was guilty of a failure to discharge his duty, were fellow servants of appellee in the sense that appellee could not recover for their negligence. It has been frequently ruled by this court that a servant for injuries not resulting in death cannot recover from the master for the ordinary negligence of his superior officers. Kentucky Distilleries & Warehouse Co. v. Schrieber, 73 S. W. 769, 24 Ky. Law Rep. 2236; C., N. O. & T. P. Ry. Co. v. Palmer, 98 Ky. 382, 17 Ky. Law Rep. 998, 33 S. W. 199; Greer v. L. & N. R. R. Co., 94 Ky. 169, 14 Ky. Law Rep. 876, 21 S. W. 649, 42 Am. St. Rep. 345; Linck's Adm'r v. L. & N. R. R. Co., 107 Ky. 370, 54 S. W. 184, 21 Ky. Law Rep. 1097. But this doctrine is limited in its application to cases in which the servant is injured by the negligence of the superior officer who has immediate control of or supervision over him. To illustrate: If appellee had been injured by the negligence of the engineer or conductor on his train, he could not recover damages against the company unless they were guilty of gross neglect. The reason of this rule is that the servant, when he engaged to work, undertakes that he will assume the ordinary risks incident to the employment,

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and will not hold the master liable for the ordinary negligence of those employes with whom he is engaged, whose actions and conduct he can observe and, if necessary, guard against.

This doctrine of assumed risk by the servant has been further extended by this court until now it is well established that a servant cannot recover from the master for injuries inflicted by the negligence of a fellow servant in the same grade of employment engaged in the same field of labor, and associated or working with the injured servant, however gross the negligence of the fellow servant may be. Hence, if appellee had been injured by the negligence of a fellow brakeman on the train he was working on, without any fault on the part of the conductor, or engineer, or other superior, or breach of duty on the part of the company, he could not recover in this action. In L., C. & R. Co. v. Cavens' Adm'r, 9 Bush, 559, the proposition before us was under consideration by the court, and it was said: "It is well settled that where one enters into the service of another he assumes to run all the ordinary risks pertaining to such service; and this means only that he cannot recover for any injury that his employer, by the exercise of ordinary care and prudence, could not provide against. And it is equally as well established that, where a number of persons contract to perform service for another, the employes not being superior or subordinate the one to the other in its performance, and one receives an injury by the neglect of another in the discharge of his duty, they are regarded as substantially the agents of each other, and no recovery can be had against the employer. Public policy requires that, where the laborers are co-equals and engaged in laboring in the same field, or on the

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same railroad train, or in any other employment, each should exercise proper care in the conduct of the business, and look to it that his co-laborer does the same thing; and, when he is told that this care and prudence is his only remedy against danger from the negligence of those employed with him, it not only makes him the more careful, but stimulates him to see that others exercise the same caution." And this principle was fully recognized and applied in L. & N. R. R. Co. v. Sanders' Adm'r, 44 S. W. 644, 19 Ky. Law Rep. 1941; Volz v. C. & O. Ry. Co., 95 Ky. 188, 24 S. W. 119, 15 Ky. Law Rep. 727; Dana v. Blackburn, 90 S. W. 237, 28 Ky. Law Rep. 695; Martin v. Mason & Hoge Co., 91 S. W. 1146, 28 Ky. Law Rep. 1333; Pitts, Hankins & Trundell v. Centers, 98 S. W. 300, 30 Ky. Law Rep. 311.

But when the servant is injured by employes of the same master, who are not directly associated with him, and with whom he is not immediately employed, and whose qualifications for the place they occupy he has no means of knowing, and in whose selection he has no voice, and over whose conduct and actions he has no control, and against whose negligence and carelessness he cannot protect himself, he may recover damages from the master for injuries received through their negligence, whether it be ordinary or gross, and without any reference to the position or place the servant causing the injury holds. And so appellee, whose injuries were directly caused by the negligence of the employes on the work train, may recover from the company, without regard to which one of them was guilty of the neglect that resulted in his injuries. The distinction between the liability of the master for injuries to the servant, when the injury is caused by the neglect of those engaged

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directly with the servant, and when it is due to the carelessness of employes not immediately associated with him, was first recognized by this court in L. & N. R. R. Co. v. Collins, 2 Duv. 114, 87 Am. Dec. 486, in a case against the company to recover damages for personal injuries inflicted by the negligence of the engineer, where it was said: "The company is responsible for the negligence or unskillfulness of its engineer as its controlling agent in the management of its locomotives and running cars; and that responsibility is graudated by the classes of persons injured by the engineer's neglect or want of skill. As to strangers, ordinary negligence is sufficient. As to subordinate employes associated with the engineer in conducting the cars, the negligence must be gross. As to employes in a different department of service unconnected with the running operations, ordinary negligence may be sufficient."

And subsequently this distinction was more clearly expressed and applied thus: In Kentucky Central Ry. Co. v. Ackley, 87 Ky. 278, 10 Ky. Law Rep. 170, 8 S. W. 691, 12 Am. St. Rep. 480, the action was brought for personal injuries received by Ackley, who was engineer upon a passenger train, resulting from a collision with a freight train of the company. It was contended by the company that, as the injuries were caused by the negligence of employes in the same grade of employment as the person injured, there could be no recovery. But the court, in rejecting this contention, quoted with approval the principle announced in L., C. & L. R. Co. v. Caven's Adm'r, supra, saying: "It is argued in that case that the rule should be applied that when a number of persons contract to perform a service for another, the employes not being superior or subordinate to each other

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in its performance, and one is injured through the negligence of another, they are to be regarded as the agents of each other, and no recovery can be had against the employer. But it was held that a different rule prevails when the employment is several, and when one is subordinate to the other, or occupies such a position in the service with reference to his co-laborer as precludes him having any control over his actions or the right to advise even as to the manner in which the service is to be performed." In Illinois Central Ry. v. Hilliard, 99 Ky. 684, 37 S. W. 75, 18 Ky. Law Rep. 505, Hilliard, who was a conductor, was injured by the giving way of a ladder on one of the cars in his train. The company requested the court to say to the jury that the car inspector, whose duty it was to keep the ladders in repair, and the conductor, were fellow servants engaged in the same line of service, and that Hilliard could not recover unless the jury believed the inspector guilty of gross negligence. This court, in commenting on this request, said that the instruction was properly refused, the conductor and inspector "acted in different spheres, and neither could or was required to know whether the other was properly doing his duty," and held that the company was liable for the ordinary negligence of the inspector.

In L. & N. R. R. Co. v. Lowe, 118 Ky. 260, 25 Ky. Law Rep. 2317, 80 S. W. 768, 65 L. R. A. 122, C., N. O. & T. P. Ry. Co. v. Hill's Adm'r, 89 S. W. 523, 28 Ky. Law Rep. 530, and L. & N. R. R. Co. v. Hiltner, 56 S. W. 654, 21 Ky. Law Rep. 1826, the rule announced in the Collins, Cavens, and Ackley cases was followed. In the cases of L. & N. R. R. Co. v. Robinson, 4 Bush, 507; L. & N. R. R. Co. v. Rains, 23 S. W. 505, 15 Ky. Law Rep. 423, and Robinson v.

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L. & N. R. R. Co., 24 S. W. 625, 15 Ky. Law Rep. 626, it was apparently held that an employe on one train could not recover from the company for the negligence of the employes on another train unless their negligence was gross; but these cases may now be regarded as having been overruled by the later ones above referred to, and it must be considered as no longer an open question in this State that there may be a recovery in a case like the one before us, although the negligence of the person causing it was ordinary. Hence the court correctly instructed the jury, if they believed from the evidence that the injury to plaintiff's foot was the direct result of negligence on the part of the agents or servants of the defendant in charge of the work train, they should find for the plaintiff.

Nor did the court err in striking from the answer the defense that the brakeman on the work train was a fellow servant of appellee, and therefore the company was not responsible to appellee for his neglect.

Appellee was permitted to testify that, while he was pinioned in the debris of the wreck, he knew it was on fire and was fearful that he would be burned to death before he could be extricated; and other witnesses were allowed to say that they saw the fire burning close to him. In our opinion it was competent to permit appellee to testify as to the mental anguish and pain that he suffered while he was fastened in the wreck. If he had not sustained any physical injury, he could not recover at all for the mental suffering he endured, as was said in Morse v. C. & O. Ry. Co., 117 Ky. 11, 25 Ky. Law Rep. 1159, 77 S. W. 361: "Damages cannot be recovered for mental suffering alone in an action for personal injuries based on negligence, unaccompanied by some

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direct contemporaneous injury to the person." But where there is a physical injury there may be a recovery for it, as well as the mental pain and suffering, occasioned by and accompanying it. Mental as well as physical suffering directly caused by an injury is a part of the compensation to which the injured person is entitled; and in the cases, without exception, that have come under our notice, the jury have always been instructed that they might compensate for mental as well as physical pain. Alexander v. Humber, 86 Ky. 565, 9 Ky. Law Rep. 734, 6 S. W. 453. As it was competent for appellee to describe fully and accurately his pain and suffering after he was extricated from the wreck and during the time the cure was being effected, and in fact up to the time of the trial, we are unable to understand upon what theory it can be maintained that it was not competent for him to relate the torture he endured when under the wreck and in momentary danger of being burned to death. In our opinion it is not at all material or important whether the mental suffering is contemporaneous with the reception of the injury or subsequent to it, if it is the direct result of it. In the able and exhaustive opinion in Denver & Rio Grande R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77, this question was fully covered, and the conclusion reached that evidence of this character is competent.

It was also admissible for appellee, as well as those who saw him under the wreck, to describe the surroundings and conditions that existed, so that the jury might know all the facts and circumstances of appellee's situation when injured. The accuracy of the photographs was testified to by the person who took them, and they furnished to the jury a more

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complete and realistic picture of the wreck of the colliding engines than could be obtained from any other source. The wreck could not be seen by the jury, nor could it be accurately described by the witnesses; but from an inspection of the photographs the jury could obtain a more correct impression and a better understanding of the situation than in any other way. Denver & Rio Grande R. Co. v. Roller, supra, 11 Am. & Eng. Ency. of Law, p. 539, 17 Cyc. 414.

Although there was no error in the admission of evidence or the instructions given by the court, we feel constrained to reverse the judgment upon the ground that the verdict is excessive. If there was sufficient evidence to show appellee's injuries were permanent, we would not interfere with the finding of the jury upon this point; but there is not. That he sustained severe injury, not only to his foot but other parts of his body, there is no doubt; but, whether they are permanent or not is another question. Appellee, in answer to the question, "Is your foot permanently injured or not?" answered, "I believe it is." Dr. Sorry, the only physician who testified for appellee, said that he had made only one examination of appellee's foot, and that a few days before the trail. The material parts of his evidence are as follows: "Q. Tell the character of his injuries from your examination, and whether or not you think it is permanent. A. Yes, sir; I think it is. Q. Did you make an examination with the X-rays to ascertain whether or not the bones were sound? A. no, sir. Q. You predicate your opinion about the permanency of the injury upon the fact that it should turn out that the bone is diseased? A. I take it the bones were diseased from the fact of the time it has

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been healing. If there was no disease of the bone, it seems like it would heal. Q. You predicate your answer solely upon that? A. From the length of time and the appearance of the wound. Q. You don't know whether or not the bone is injured? A. No, sir; the symptoms indicate that, by having a running sore for several months. Q. If there has been no injury to the bone, and no diseased condition of the bone, do you think it will not heal? A. If there is no disease of the bone, that flesh wound will heal yes, sir."

For appellant the two physicians who treated appellee were introduced, and testified that they made an examination of appellee's foot with the X-rays, and in answer to questions said: "Q. I will ask you whether any of the bones of his foot or ankle or leg are broken or affected. A. No, sir; they are not. Q. Tell the jury how you know it? A. Well, simply by examination at the time of the accident, and while the wound was fresh. Q. Have you ever examined it with the X-rays? A. Yes, sir; examined it with the X-rays, and I also asked Dr. Nesbitt to examine it with them. Q. Did both of you examine it with the X-rays? A. Yes, sir. Q. Is there any injury at all to the bone? A. No, sir; there is not. Q. What was the nature of the wound, that causes it to be so long healing? A. It was a flesh wound and considerable bruise; the muscles torn, and the skin considerably bruised, and a tear and laceration also." These doctors also testified in substance and effect that his injuries were temporary. It will be observed that the physician who testified for appellee made only one examination, and that without using the X-rays, and his conclusion that the foot was permanently injured was based on the fact that in his opin-

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ion the bones of the foot were diseased; while the physicians who treated him for the injury, and who examined his foot frequently and with the X-rays, say that the bones are not injured, and that in time the foot will be restored to its normal condition.

We are not aware of any case in which the court has sustained a verdict as large as this one unless the injuries were permanent. The fact that the negligence was gross, and that punitive damages were allowed, and that appellee was entitled to more than mere compensation for his mental and physical suffering, does not imply that a jury are at liberty, unrestrained, to award by way of punitive damages any amount, however large it may be. This court has the same power and discretion to set aside a verdict, when excessive, in cases involving punitive damages as it has where only compensation is recovered. In every case, if the verdict appears to have been given under the influence of passion or prejudice, a new trial will be granted. L. & N. R. R. Co. v. Long, 94 Ky. 410, 15 Ky. Law Rep. 199, 22 S. W. 747; Standard Oil Co. v. Tierney, 92 Ky. 367, 13 Ky. Law Rep. 626, 17 S. W. 1025, 14 L. R. A. 677, 36 Am. St. Rep. 595. As was said by this court in Louisville Railway Co. v. Minogue, 90 Ky. 369, 12 Ky. Law Rep. 378, 14 S. W. 357, 29 Am. St. Rep. 378: "It is impossible to measure with anything like absolute certainty the amount of punitive damages proper in a case, or the extent of some of the elements of those which are compensatory. The opinion of a jury has been, and properly, no doubt, regarded as the best means of even a fair approximation, and every verdict should be treated prima facie as the result of honest judgment upon their part. They are the constitutional triors of the facts of the case, and courts should

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exercise great caution in interfering with their verdicts. Litigants must not be left, however, to their arbitrary will, and be without remedy in cases where verdicts can be accounted for only upon the theory that they are the result of an improper sympathy or unreasonable prejudice."

It will readily be conceded that it is peculiarly within the province of the jury to fix the amount of damage that a person is entitled to for mental and physical suffering, and will also be agreed that there is no rule by which the amount that should be awarded can be measured. For these reasons this court has always been reluctant to interfere with the finding of a jury upon the question of damages, and especially is this true when the injury is permanent, or of such character as to disable the injured person from pursuing his usual occupation or employment, or one that will cause him to suffer serious pain probably through life. But, if appellee's foot should be fully restored, and there is a complete recovery, and he is placed in the same physical condition as he was before the injury, it appears to us at first blush that the verdict is too large. The future effect of the injury should be shown with reasonable certainty to authorize damages upon the score of permanent injury.

For the error in the amount of damages, the judgment must be reversed, with directions for a new trial.

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CASE 70.—ACTION BY W. H. YEAGER'S ADMINISTRATOR AND OTHERS AGAINST THE BANK OF KENTUCKY AND ITS SUCCESSOR, THE NATIONAL BANK OF KENTUCKY.—January 9.

Yeager, &c., v. Bank of Kentucky

Appeal from Jefferson Circuit Court; Chancery Branch; Second Division.

SAMUEL B. KIRBY, Judge.

Judgment for defendant on demurrer, plaintiffs appeal—Affirmed.

1. Wills—Failure to Dispose of Remainder.—Where a testator by his will leaves the income from his estate to his widow during life, but no disposition is made of the remainder after her death, it passes to and vests in his heirs.
2. Remainders—Action by Remaindermen—Accrual of Right of Action—Limitations.—Where defendant bank assisted one entitled to a life estate in some of its stock to sell the stock outright, the owners of a vested remainder therein had a right of action at once, without waiting for the termination of the life estate; and where they did not sue within the period of limitations, after knowledge of the facts, their rights will be barred by the statute.
3. Limitation on Actions—Continuing Trust—Renunciation—Sale for Own Benefit.—A sale by a trustee for hi own interest is a repudiation of the trust, and limitations begin to run against the cestui que trust from the date of the sale; hence, even if the bank was a trustee holding title for the benefit of remaindermen when the stock was sold, there was a renunciation of the trust, in which the bank joined, and a cause of action arose at once in favor of the remaindermen.

BARNETT & BARNETT, BURNETT & BURNETT, JAMES S. MORRIS and HARDIN H. HERR, Attorneys for appellants.

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POINTS AND AUTHORITIES.

1 (a) Statute of limitations do not apply to a continuing and subsisting trust. (Ky. Stats., section 2543; Blake v. Wolfe, 105 Ky., 386; Robinson v. Elam, 90 Ky., 300; Perry on Trust, sections 2, 433 and 260.)

(b) A corporation is compelled to take notice of the contents of the will disposing of its stock. (Stewart v. Firemen's Ins. Co., 43 Md., 564; Marbury, Trustee, v. Ehlen, 72 Md., 2060; Caulkins v. The Gas Co., 85 Tenn., 564.)

(c) A corporation is the trustee for its stockholders. (Wooten v. Railroad Co., 128 N. C., 119; Peck v. Providence Gas Co., 17 R. I., 275.)

2. The fololwing cases are differential from the case at bar: Coffey v. Wilkerson, 1 Met., 101; Edwards v. Woolfolk, 17 B. Monroe, 376; Meeks v. Olphert, 100 U. S., 564; Willson v. Louisville Trust Co., 102 Ky., 522; Wickliffe v. Lexington, 11 B. M., 166; Williams v. Williams' Exrs., 25 Ky. Law Rep. 828, s. c. 76 S. W. 413; Roberts v. Roberts, 7 Bush, 104; C. & O. R. Co. v. Bowler, 9 Bush, 468, 481; Hall v. Ditto, 11 Ky. Law Rep., 667; Blades v. Grant Co. Bank, 111 Ky. 163; Jolly v. Miller, 98 S. W., 326.

3. Where an appellate court expressly leaves questions open for future litigation there is no res judicata as to the questions left open. These questions must be decided on the second appeal. Arnold v. Arnold, 11 B. M., 181; Smith v. Brannin, 79 Ky., 119! Gleason v. Barnett, 106 Ky. 134, second appeal 115 Ky. 895; Park v. Orth, 24 Ky. Law Rep., 2209, s. c. 73 S. W. 1015, second appeal 117 Ky. 781, s. c. 35 Am. & Eng. R. R. Cases (new series), 536; Lewisburg Bank v. Sheffey, 140 U. S., 445; Yeager v. Bank of Kentucky, 127 Ky. —, s. c. 100 S. W. 848, s. c. 30 Ky. Law Rep. 1287.)

ALEX. G. BARRETT for appellee bank.

PROPOSITIONS AND AUTHORITIES

1. Limitation begins to run against persons entitled in remainder at the date of the wrongful conversion of the trust property, though this occurs before the life tenant's death.

(a) Legal remainders. (Coffey v. Wilkerson, 1 Met., 101.)

(b) Equitable remainders. (Edwards v. Woolfolk, 1 B. Mon., 376; Meeks v. Olpherts, 100 U. S., 564; Willson v. Louisville Trust Co., 102 U. S., 522.)

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2. When the trustee sells the trust property in violation of the rights of the cestui que trust the trust is repudiated and there is no longer a continuing and subsisting trust. (Willson v. Louisville Trust Co., 102 Ky., 522; Wickliffe v. Lexington, 11 B. M., 166; Williams v. Williams' Exor., 25 Ky. Law Rep., 838.)

3. Plaintiff's authorities discussed.

4. This court's opinion on the former appeal of this same action is decisive of the present appeal. (Yeager v. Bank of Ky., 30 Ky. Law Rep., 1287.)

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

W. H. Yeager, a resident of Jefferson county, Ky., died in 1891. His will was probated in the county court of that county. By the terms of his will his wife, Nannie R. Yeager, was entitled to receive all of the income from the estate during her life. No disposition was made of the remainder of his estate after the death of his wife, and it therefore passed to and vested in his collateral heirs. A portion of his estate consisted of 10 shares of the capital stock of the Bank of Kentucky, and the appellee the National Bank of Kentucky is the successor of the Bank of Kentucky. Some six years after the death of her husband. Nannie R. Yeager, his wife, made known to the bank that she desired to sell these shares of stock, and the bank procured a purchaser for her for said stock. In 1904 Nannie R. Yeager died. This action was instituted against the Bank of Kentucky and the National Bank of Kentucky, seeking to recover of them for the conversion of these shares of stock. General and special demurrers were filed by the defendant banks to this petition, and, the court having sustained both, the plaintiffs appealed, and this court reversed the judgment; the opinion being found in 100 S. W. 848, 30 Ky. Law Rep. 1287. In that opinion two questions

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are decided: First, that the administrator de bonis non did not have the right to maintain the suit, but that it must be brought in the name of the heirs and remaindermen; and, second, that the statute of limitations, to be available, must be pleaded affirmatively. Upon the return of the case the pleadings were amended, so that the heirs and remaindermen were made parties plaintiff to the action. To the petition as thus amended an answer was filed pleading the statute of limitations. To this answer a reply was filed, denying that the plea of limitation was available, and also stating that the cause of action was on a continuing and subsisting trust. To this reply a demurrer was interposed and sustained. The plaintiffs declining to plead further, their petition was dismissed, and they again appeal.

The question in issue in this case is sharply drawn, the facts all being admitted. For appellee it is contended that the statute of limitations begins to run against remaindermen before the termination of the particular estate. This proposition is denied by appellants. The pleadings show that the sale and transfer of these shares of bank stock was made on February 6, 1897, and that the plaintiffs, appellants, learned of this sale in 1899. The suit was instituted May 13, 1905; hence it is admitted, not only that the sale had been consummated and the title passed to the purchaser by Nannie R. Yeager more than eight years before the institution of this suit, but that appellants had actual notice, more than five years before the institution of their suit, that she had so sold and divested herself of the title to said stock. The petition charges that the bank assisted Mrs. Yeager in selling and transferring this stock, and thereby enabled her to convert it to her own use;

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that it was charged with notice of the provision of the will of her husband, and knew that she had no power to sell the stock; that such a sale was a constructive, if not actual, fraud upon the rights of the remaindermen in said estate. The action being based upon fraud, it is insisted for appellees that section 2515 of the Kentucky Statutes of 1903 applies. For appellants it is contended that limitation does not begin to run from the time of the sale and transfer of the stock, or from the time that notice of such sale and transfer was brought home to them, but that it can only begin to run from the death of the life tenant, as she was entitled to the free use and enjoyment of the proceeds of such sale during her lifetime.

In the case of Coffey v. Wilkerson, v Metc. 101, plaintiffs were the owners of some slaves, subject to the life estate of their father in said slaves. They alleged that the defendant, Coffey, had purchased their father's life estate and afterwards sold the absolute title to the slaves to Southern traders, and they sought to recover of Coffey the value of the slaves with interest. The sale to Coffey by their father had been made more than five years before the action had been brought, but the action was brought less than two years after the death of their father. In passing upon the right of plaintiffs to maintain that suit, this court said: "The tenant for life of slaves, or any purchaser under him, will be restrained by a court of equity, on the application of the owners of the estate in remainder, from doing any act that will jeopardize their interest, upon the representation of such a state of case as shows the existence of good grounds to apprehend that the person holding the life estate has the commission of such an act in contemplation; and where, as in this case, the person holding the

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life estate converts not merely the life estate, but the absolute and entire estate, in the property to his own use, and that with the effect of defeating the enjoyment of the estate in remainder, he becomes immediately responsible for the act to the persons entitled in remainder, who have a right to recover against him the full value of their estate. The cause of action accrues so soon as the wrong has been committed. It consists in the injury which has been done to the estate in remainder. It exists independent of the life estate, and is not affected in any manner by its termination. An action for the injury can be maintained during the existence of the life estate, or after it has ended; but, as the cause of action accrues at the time of the conversion, the statute of limitations runs from that time, and consequently forms a bar to the present action." The case at bar is very similar to the case from which we have just quoted. The subject-matter under consideration in the two cases is the sale of personal trust property. In each a life estate was created—in the one in favor of the father of the plaintiffs, and in the present case in favor of the wife of the decedent. In each case the property was sold and transferred to the purchaser more than five years before the institution of the action seeking its recovery, although in each case the life tenant had died less than five years before the institution of the action. We are unable to draw any distinction or see any difference between the facts in these two cases. They are as nearly identical as could well be found.

We are aware that a contrary rule has been adopted and followed by courts of last resort in some of our sister States, wherein it is held that the statute of limitations does not begin to run against remainder-

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men until the death of the life tenant; but such is not the rule in this State. Our courts have for a period of more than 50 years followed the rule laid down in Coffey v. Wilkerson, and the principles therein announced have been followed with approval in some of the State courts and in the United States courts; hence the opinion of the lower court must be affirmed, unless, as insisted upon by appellants, this is a continuing and subsisting trust, and therefore not subject to the limitations which would otherwise apply. Practically the same question raised in this case was before this court in the case of Wilson v. Louisville Trust Company, in which case land had been conveyed to one Schrader in trust for Mrs. Phillips for life, with remainder to her children, but no power of sale was conferred upon the trustee. Thereafter the trustee, in 1863, sold 33 acres of this property to one Roth, and conveyed it to him in fee. In 1898 an action was brought to foreclose a mortgage executed by Roth, the purchaser, on this 33-acre tract. The land was sold, and the purchaser filed exceptions to the report of sale on the ground that Roth had not only constructive, but actual, notice of the trust, and of the trustee's want of power to sell, and that therefore the equitable remaindermen could recover this land at any time within 15 years after the life tenant's death, which occurred only 3 years prior to the institution of this suit. In that case, as in this, the purchaser charged in his exceptions to the report of sale that Roth, who purchased from the trustee, knew of the existence of the trust, and therefore became a party with the trustee to the wrong done the remaindermen, and pleaded, further, that because the trustee, in his conveyance to Roth, united with Roth in the breach of trust, he was estopped from

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suing for the property, and that therefore the remaindermen were not affected by the statute of limitations, but could sue at any time within 15 years after the death of the life tenant. In passing upon the exceptions, upon appeal to this court, it was said: "It has been expressly held by this court that, when a trustee holds the legal title to real estate which is barred by the statute of limitation, the equitable interests dependent upon it will also be defeated, notwithstanding the cestui que trust is an infant; * * * and this seems to be the general rule of construction. The question in this case is: Does this rule apply where the trustee has joined in the conveyance under which the vendee claims, and does the fact of his having united in such a conveyance estop him from any proceedings to recover, notwithstanding such action on his part?" The court then quotes, with approval, from the case of Meeks v. Olpherts, 100 U. S. 566, 25 L. Ed. 735, wherein it is said that, "wherever the right of action in the trustee is barred by the statute of limitation, the right of the cestui que trust, which is represented, is also barred." And, continuing: "In this case the right of action accrued to the trustee, who held the legal title for the benefit of all those beneficially interested, as soon as Roth took possession. The vendee has admittedly been in possession of the land for more than 32 years, holding adversely both to the trustee and the cestui que trust, and has obtained by the statute of limitation a complete title which cannot be disturbed. Any other construction would destroy the purpose and intention of the statutes, which are statutes of repose, and the rule 'that, if one purchases property of a trustee with notice of the trust, he shall be charged with the same trust in reference to the property as the trustee from whom

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he purchased, even if he pays a valuable consideration, with notice of equitable rights of third persons, and shall hold the same subject to the equitable interests of such persons (which is so strongly invoked by the appellant herein), does not apply to a purely constructive trust, and such a person may apply the statute, though in other respects equity will treat him as if he were the trustee.' By the sale of the bank stock in 1897 Mrs. Yeager repudiated the trust, and there was not, nor could there have been, a continuing and subsisting trust, after the sale of the stock by her as trustee, for the reason that the trust relation no longer existed.

Our courts have uniformly held that a sale by the trustee for his own benefit is a repudiation of the trust, and from the date of the sale limitation begins to run in favor of the trustee and against the cestui que trust. The case of Wickliffe v. Lexington, 11 B. Mon. 155, is an interesting case directly in point. In 1782 the Virginia Legislature conveyed the land whereon the city of Lexington now stands to trustees, who were required to make conveyances to the settlers on the lots. By contract among themselves each settler was entitled to one inlot and one outlot. In 1832 Mrs. Wickliffe brought suit against the city of Lexington, as successor to the original trustees, in which she sought, as sole heir of her father, to recover an inlot and an outlot to which he was entitled as one of the original settlers. The city claimed in its answer that an inlot and an outlot had been allotted to plaintiff's father, and sold by his executrix, and conveyed to the purchaser by the trustees. Plaintiff denied the right of the executrix of her father to sell the lots, and denied the right and authority of the trustees to convey the title to the purchaser. In re-

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viewing this case upon appeal this court said: "If the trustees of the town conveyed the lots to those who had no right to them, although the act was wrongful, and amounted to a breach of trust, yet it conferred no right on the heir at law to demand other lots, although it may have rendered the trustees liable for the value of the lots so improperly conveyed to them. But, if such liability was incurred by the trustees, it cannot be enforced at this late period; more than 40 years having elapsed after the execution of the deeds by them before this suit was instituted. It is argued, however, that in cases of trust there is no limitation, and that the lapse of time does not bar this claim against the city. This doctrine, however, applies alone to cases where there is a direct, express, and subsisting trust of a purely equitable nature, and not in cases where the trust which once existed has been violated, and a suit is brought to obtain redress for the injury resulting from the breach of trust. Had the title to the property still remained with the trustees or their successors in office, they would have held it in trust for those entitled to it, and the doctrine contended for would then have had a direct application in a proceeding against the trustees in a court of chancery to compel them to convey the legal title. But, when they had conveyed away the legal title wrongfully, what trust existed between them and the rightful owner of the lots? The trust had ceased by the execution of the conveyance. The act by which it was terminated had imposed a new liability upon the trustees; but that liability was not in the nature of a trust, either expressed or implied. The trust had been openly renounced, and it no longer subsisted; but in its stead a liability had arisen of a different character, and one that had to be enforced,

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if at all, within the time allowed by law for redressing similar injuries by a resort to a proper tribunal for that purpose." It will thus be observed that in this case the court held that a sale of the trust property by the trustee, though wrongful, nevertheless operated as a breach of the trust, and that therefore the trust relation between the trustee and the cestui que trust no longer existed. This principle was also recognized in the cases of Williams v. Williams' Ex'r. 25 Ky. Law Rep. 838, 76 S. W. 413, Roberts v. Roberts, 7 Bush, 104; Hall v. Ditto, 11 Ky. Law Rep. 667, 12 S. W. 941, and Blades v. Grant County Bank, 101 Ky. 163, 19 Ky. Law Rep. 340, 40 S. W. 246, 41 S. W. 305.

It is insisted for appellants that, inasmuch as the bank procured a purchaser for this stock and enabled and assisted the life tenant, Mrs. Yeager, to make disposition thereof, it is liable, for the reason that it was a trustee holding the title to this property for the benefit of appellants. The same reasoning that would support the plea of the statute of limitations as to Mrs. Yeager would apply with equal force to the bank. The fact that the bank and Mrs. Yeager acted together in the disposition of this stock does not enlarge appellants' rights, and it is immaterial whether one or both was acting in the capacity of trustee for appellants in its management of this stock. When it was sold, and the trustee had parted with her title thereto, and the stock had been transferred and delivered to the purchaser, there had been a breach of the trust, a renunciation thereof by the trustee, in which the bank joined, and a cause of action at once arose in favor of the remaindermen. With a full knowledge of all of these facts, appellants permitted more than five years to run before they

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instituted their suit seeking to recover for its wrongful sale and conversion, and they have thereby lost their right to recover.

Being of opinion that the defendant presented a valid defense in the plea of the statute of limitations, set up in its answer, and the reply being insufficient for the reasons given, the trial court properly sustained the demurrer to the reply.

The judgment is affirmed.

CASE 71.—ACTION BY JOHN L. DODD AND OTHERS AGAINST THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD CO. AND OTHERS.—January 14.

Dodd, &c., v. Pittsburg, C., C., & St. L. Ry. Co., &c.

Appeal from Jefferson Circuit Court; Chancery Branch; First Division.

SHACKELFORD MILLER, Judge.

Judgment for defendants, plaintiffs appeal—Reversed.

1. Corporations—Misappropriation of Corporate Earnings—Recovery at Suit of Minority Stockholders—Attorney's Fees Paid by Corporation.—In a suit by minority stockholders of a corporation against a railroad company for its wrongful appropriation of the assets and earnings of the corporation, resulting in another railroad company recovering judgment against the corporation, attorney's fees paid by the corporation in defense of the action resulting in the judgment are not recoverable as a part of the costs.
2. Same—Nature of Liability for Loss.—A bridge company con-

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tracted with several northern railroads and one southern road for the the use by them of its bridge on payment of equal charges sufficient to provide for annual dividends and a sinking fund. One of the northern roads, by virtue of its control of the bridge company, required the latter to pay rebates to northern roads, to the exclusion of the southern road, which afterwards recovered judgment aganst the bridge company for its proportion of the rebates. Held, That the loss suffered by the bridge company was a tort committed against it by the railroad company controlling it, rendering the railroad company liable for the entire loss at the suit of the minority stockholders of the bridge company.

3. Judgment—Res Judicata—Matters Concluded—Nature of Cause of Action.—A decision in an action by minority stockholders of a corporaton to compel defendant to satisfy a judgment against the corporation in an action on a contract, which denies relief, is not conclusive on the right of the minority stockholders to compel defendant to satisfy a judgment against the corporation for a tort.

4. Appeal and Error—Failure to Present Question Below—Departure in Pleading.—Where, in a suit by minority stockholders of a corporation to compel defendant to pay a judgment rendered against the corporation, the reply, on which issue was joined, advanced the theory of a right of recovery for fraud committed by defendant, and the matter was litigated on that issue, defendant could not on appeal defeat a recovery on the ground that the theory of fraud was a departure and could not, under the circumstances, be made the foundation of the action.

5. Pleading—Reply—Defensive Matter.—Where, in a suit by minority stockholders of a corporation to compel defendant to satisfy a judgment against the corporation, defendant relied on a decision of the court denying relief to the stockholders, demanding that defendant should satisfy another judgment against the corporation in an action on a contrac., a reply advancing the theory that the ground of recovery was based on a tort committed by defendant, was available under Civil Code Prac., section 101, authorizing a pleading of equitable matter, of avoidance or estoppel, etc.

6. Corporations—Misappropriation of Corporate Funds—Actions by Minority Stockholders.—A railroad company owned a majority of the stock of a bridge company and of defendant, another railroad company. The bridge company contracted with defendant and other railroads for the use by them of

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its bridge. The principal officers of defendant were the officers of the bridge company, and by reason of such control the earnings of the bridge company were wrongfully divided for the benefit of defendant. Held, That defendant, in a suit by minority stockholders of the bridge company, must pay the loss sustained, and the railroad company controlling defendant, having received no benefit from the wrongful division of the earnings, was not liable.

7. Same.—A bridge company contracted with railroads for the use by them of its bridge on payment of equal charges sufficient to provide for annual dividends and a sinking fund. One of the contracting railroads, by virtue of its control of the bridge company wrongfully divided the surplus earnings of the bridge company to the exclusion of another contracting railroad, which afterwards recovered judgment against the bridge company for its share of the earnings so appropriated. Held, That the railroad company misappropriating the funds could not defeat a recovery of the loss sustained, at the suit of the minority stockholders of the bridge company, on the theory that the division of earnings was intra vires and made to carry out a bona fide scheme to conserve the interest of the bridge company from competition.

8. Limitation of Actions—Accrual of Cause of Action.—The right of minority stockholders of a corporation to compel defendant, controlling it, to satisfy a judgment obtained against it, based on the fraudulent division by defendant of the surplus earnings of the corporation, accrues when the corporation is compelled to pay the judgment, and not when the wrongful division of the earnings was made; a juncture of wrong and damage giving rise to a cause of action.

KOHN, BAIRD, SLOSS & KOHN, W. O. HARRIS and J. C. DODD for appellants.

HELM, BRUCE & HELM and LAURENCE MAXWELL for appellees.

OPINION OF THE COURT BY JUDGE LASSING—Reversing.

Appellants were the plaintiffs in the circuit court, and the present appeal is from a judgment of the Jefferson circuit court, rendered January 7, 1905, dis-

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missing the ninth paragraph of the amended petition, filed October 15, 1903, and supplemented and extended by amendments of February 25, 1904, and October 20, 1904. Many of the questions involved have been settled by this court in a previous appeal in this same case, reported in 115 Ky. 176, 24 Ky. Law Rep. 2058, 72 S. W. 822, 74 S. W. 1096, under the title "Pittsburg, C., C. & St. L. Ry. Co. et al. v. Dodd et al.," and we shall not in this opinion go over what was there decided.

After the case was returned to the trial court the plaintiffs amended the ninth paragraph of their previous pleading, filed October 15, 1903, and the present appeal deals exclusively with the ninth paragraph and its amendments and the proceedings thereon. In that paragraph it was alleged in substance that on March 11, 1902, a judgment was rendered against the Louisville Bridge Company, in favor of the Louisville & Nashville Railroad Company, for certain rebates of tolls, accruing during the years, 1888, 1889, 1890, and 1891, amounting, with interest computed down to March 11, 1902, to the sum of $259,280.61 and costs; that, shorn of interest, the principal covered in the judgment was $150,775.88. The paragraph then proceeds with other allegations in general to the effect that the judgment so recovered had not yet been paid, but that the defendant Pittsburg, Cincinnati, Chicago & St. Louis Railway Company was endeavoring to cast the burden of the judgment upon the bridge company, with a prayer that the bridge company and defendant be required to make immediate demand upon the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company to pay, and that that company be required to pay into the treasury of the bridge company a sufficient amount to

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satisfy the said judgment. On December 12, 1903, the parties to this litigation entered into a written agreement, settling all of their differences, but expressly reserving to the plaintiffs and for further litigation any loss to which the bridge company might be subjected by virtue of the matters set forth in the ninth paragraph above referred to, growing out of the judgment which the Louisville & Nashville Railroad Company had recovered against the bridge company for the rebate of tolls in the years aforesaid. The manner of the rebating of these tolls is fully set forth and explained in the opinion of this court in 115 Ky. 176, supra.

By an amended pleading filed by the plaintiffs on February 25, 1904, this agreement of December 12, 1903, is in general terms set out, and it is further there alleged that the defendant Pittsburg, Cincinnati, Chicago & St. Louis Railway Company paid only a part of the judgment recovered against the bridge company, leaving unpaid and casting as a loss upon the bridge company a certain portion which the bridge company was required to pay, and which amounted on the date of payment, to wit, January 11, 1904, to the sum of $144,328.28. In general terms it is alleged that this amount, which the bridge company was required to pay, was the result of a wrongful appropriation of the assets and earnings of the bridge company by the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, and that during the time these rebates were being made, for which the judgment of the Louisville & Nashville Railroad Company was recovered, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company had derived a profit of $304.412.95. By stipulation of the parties it is agreed that these amounts are correct. The pleading of

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February 25, 1904, prays judgment against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company for the sum of $144,329.28, with interest thereon at the rate of 6 per cent. per annum from January 11, 1904, and costs. The amended pleading of date October 29, 1904, refers to a matter of attorney's fees paid by the bridge company in defense of the suit of the Louisville & Nashville Railroad Company, which resulted in the judgment above referred to; and as the court is of the opinion that the attorney's fees cannot be recovered as a part of the costs, it will not be necessary here to consider that pleading. See Gaar v. Louisville Banking Co., 74 Ky. (11 Bush) 180, 21 Am. Rep. 209.

The Louisville & Nashville Railroad Company recovered another judgment against the Louisville Bridge Company for its proportion of the rebates of tolls for the year 1892, 1893, 1894, and 1895, which was before this court in 106 Ky. 674, 25 Ky. Law Rep. 405, 51 S. W. 185. On the previous appeal in this case (115 Ky. 176, supra, the plaintiffs sought to recover against the appellee for the loss sustained in the payment of this judgment; but that contention was denied in the judgment of this court in 115 Ky. 176, supra. It is contended by appellees that the principle of that judgment enforces a decision against the contention of the appellants made here, even if it be not a foreclosure of the contention under the principles of res judicata. The contention of the appellants is that the loss which they desire in this proceeding to restore to the bridge company grows out of a tort of the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, while there was no feature of tort so far as the bridge company was concerned in the judgment recovered by the Louis-

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ville & Nashville Railroad Company in the case decided in 106 Ky. 674, supra, and for which a recoupment was denied in 115 Ky. 176, supra, and that, therefore, they are not estopped, either by the principles of res judicata or precedent of the former case. Both parties seriously contend for and against the claim on the ground of tort as an original proposition, and this requires a short statement of the main features of the case.

While a vast quantity of evidence has been introduced and the record is exceptionally large, the facts which control the question at bar are few and not disputed. The dispute attaches mainly to the deductions drawn from the admitted facts. It appears that the Louisville Bridge Company was organized with a capital of $1,500,000, all of which was paid in, and that this, together with $800,000 borrowed on an issue of bonds secured by mortgage, constructed and equipped the bridge, which was open for traffic on February 12, 1870. On its total capital, consisting of 15,000 shares, the Pennsylvania Railroad owns and has owned, at least since 1880, as agreed by the parties, 9,006 shares, giving it a control in stockholders' meeting; and it further appears from the stipulation that the Pennsylvania Railroad owns all of the stock of the Pennsylvania Company, and it is not disputed that the Pennsylvania Company manages all of the railroad interests of the Pennsylvania Railroad west of Pittsburg, and that in turn the Pennsylvania Company owned and controlled the Jeffersonville, Madison & Indianapolis Railway, which, with other railroads, in the year 1890 was consolidated into the appellee Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, and that by this consolidation the Pittsburg, Cincinnati, Chicago & St.

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Louis Railway Company assumed all of the obligations of the Jeffersonville, Madison & Indianapolis Railroad Company, and it is stipulated that the Pennsylvania Railroad Company owns, and has always owned since the consolidation, 57 per cent. of the stock of the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. It appears that on June 5, 1872, the Louisville Bridge Company, together with the Louisville & Nashville Railroad Company, which was the only railroad approaching the bridge, which spans the Ohio river at Louisville, from the south, and the Jeffersonville, Madison & Indianapolis Railroad, and the Ohio & Mississippi Railroad, then the only railroads approaching it from the north, entered into a written contract which is set forth in full on the former appeal of the case in 115 Ky. 176, supra. It is not necessary again to set forth the contract here. The general plan of that contract was to keep up merely the corporate organization of the bridge company, and to pay its operating expenses and taxes, and to provide a sinking fund to retire its indebtedness of $800,000 at its maturity in 1888, and to pay a semiannual dividend to its stockholders. The railroads assumed the management and control of its property and while the contract provided that the tolls should be fixed at a sum sufficient in the aggregate to raise a sum sufficient to meet the fixed charges, this provision was very soon breached. From the beginning the railroads in effect fixed the tolls.

During the first years of operation under the contract all of the surplus earnings were paid over to the sinking fund to retire the bonded indebtedness. In 1875 the Ohio & Mississippi Railroad Company, through its president, complained that the tolls were excessively high, and that, unless reduced, it would

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retire from the contract, under a clause which permitted this upon two years' notice. It seems, however, that nothing was done under this threat, but that in the latter part of 1880, or the first part of 1881, a meeting was held at which the bridge company, the Ohio & Mississippi Railroad Company, and the Jeffersonville, Madison & Indianapolis Railroad Company were represented. At this meeting it was agreed that the tolls should not be reduced, but that the contribution to the sinking fund of the bridge company should be reduced, and, instead of paying over all of the surplus earnings, they should pay over only an amount of $36,500 per annum, which was calculated to be a sufficient contribution to retire the bonds at their maturity in 1888, and this sum did subsequently retire the bonds and leave a small surplus. At that meeting it was further agreed that all of the earnings of the bridge company, and it appears that it had certain terminal properties which it rented and probably other sources of income, should be turned over to a common fund, and that after the payment of the fixed charges the balance should be divided among the Northern roads in the proportion of the traffic furnished by them respectively. It appears that the Louisville & Nashville Railroad Company was not invited to this conference, and had no part in it, and was never apprised of it, but, on the contrary, that this arrangement was concealed from the Louisville & Nashville Railroad Company until about the year 1888.

At the time of this agreement, in 1880 or 1881, it appears from the agreed stipulation that the Pennsylvania Railroad Company, then acting in its stockholding interest in the bridge company, elected three out of five of the members of the board of directors

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of the Louisville Bridge Company, and at that time and thereafter actually elected as its representatives on that board the first, second, and third vice presidents of the Pennsylvania lines west of Pittsburg, and that during the whole time of the present controversy these officers were elected without reference to their individual personality, but wholly by virtue of the fact that they occupied these respective positions in the Pennsylvania interest. It further appears that at none of the times in controversy did any of these officers thus elected in the Pennsylvania interest have any stock in the bridge company, and none of them was paid any salary by the bridge company, but all received their entire compensation from the other Pennsylvania interests. It further appears from the evidence that the meetings of the stockholders of the bridge company were merely perfunctory, and that in fact its whole directory was elected by the stock of the Pennsylvania Railroad, and that the meetings of the board of directors were few and far between. Under these circumstances the agreement to keep the tolls of the bridge company at a rate in excess of the contract and to divide the surplus between the two railroads which came to it from the north, was made, and a letter of instructions was written by an officer of the Pennsylvania Company to the accounting officer of the bridge company, giving him a form for keeping the accounts and for the division of this surplus, and expressly excluding from participation the Louisville & Nashville Railroad Company. Under this arrangement the tolls were maintained far in excess of raising an amount equal to pay the fixed charges provided for in the contract of June 5, 1872, and the surplus was

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divided among the Northern railroads from the year 1880 down to and including the year 1891.

Shortly after the agreement was made the Louisville, Evansville & St. Louis Railroad Company, called the "St. Louis Air Line," and the Louisville, New Albany & Chicago Railway Company, called the "Monon," were incorporated, and were permitted to participate in the surplus of the bridge company. Both of these latter railroads, the "Air Line" and the "Monon," as well as the Ohio & Mississippi Railway Company, failed and went into the hands of a receiver before the initiation of any of the litigation here concerned. It is stipulated that during the years 1881 to 1891, both inclusive, there was rebated out of the surplus earnings of the bridge company to the appellee and its predecessor, whose obligations it assumed, the sum of $900,787.02, and that for the years 1888 to 1891, both inclusive, there was rebated to the appellee and its predecessor, out of these surplus earnings, the sum of $304,412.95. These amounts, by stipulation, are agreed to be so much profit to the appellee and its predecessor out of the surplus earnings of the bridge company, which were accumulated in breach of the contract between the railroads and the bridge company. In this division of the surplus earnings among the Northern railroads the Louisville & Nashville Railroad Company was entirely ignored and the distribution was concealed from it, and in this way that proportion of the surplus earnings which were exacted from the traffic furnished by it in violation of the contract of June 5, 1872, was divided among the Northern railroads; and it was to recover this wrongful exaction that the Louisville & Nashville Railroad Company instituted two actions against the Louisville Bridge Company in

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the year 1892. It (the Louisville & Nashville Railroad Company) discovered somewhere in the year 1888 that it was being discriminated against under the contract of June 5, 1872, and that the discriminatory tolls exacted upon its traffic crossing the bridge were being divided wholly among the Northern railroads. An inquiry was set afoot which resulted in a meeting of the railroads patronizing the bridge at Cincinnati, by virtue of which it was agreed that, beginning with January 1, 1902, the railroads on the north would pay to the bridge company the proportion of the surplus tolls which belonged to the Louisville & Nashville Company, if it was finally adjudged to be entitled under the contract of June 5, 1872, to participate in the surplus. The "Monon" alone disagreed to this arrangement and defaulted in the payment of any tolls, which brought about a loss which was adjudged on the former appeal in 115 Ky. 176, supra. Likewise the "Air Line," while entering into the agreement, defaulted in the payment of a small amount of tolls, which was adjudged on the previous appeal; but none of these defaults has any bearing upon the question now before the court.

The manner in which these rebates were conducted, in short, was this: The Louisville & Nashville Railroad Company, from the making of the contract and during the entire period covered by this litigation, received its interchange of traffic from, and delivered its interchange of traffic to, the Northern railroads, and permitted the Northern railroads to keep the accounts. The bridge company never for itself kept an account of the traffic that passed over its bridge, but received its account from the railroads, and in this way the accounts of its entire traffic were furnished to it by the Northern railroads in one account,

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which did not, prior to 1892, separate the Louisville & Nashville traffic delivered to the Northern roads from the traffic of the Northern roads delivered to the Louisville & Nashville, and thus the entire traffic down to 1892, in the information furnished the bridge company, appeared to be the traffic exclusively of the Northern railroads. Quarterly the bridge company, from its own data of expenses and the traffic furnished it by the Northern railroads, would deliver to the railroads a statement showing the gross traffic and the fixed charges to be paid under the operating contract, and upon these statements so furnished the railroads would at intervals furnish to the bridge company the funds necessary to meet its fixed charges, withholding the balance, and the amounts thus retained are what in this opinion and in the record are denoted "rebates." In this way, the wrongful exactions by surplus tolls from the traffic furnished by the Louisville & Nashville were divided among the Northern railroads, and this continued down to and including the year 1891; but thereafter, and beginning with the year 1892, under the agreement made at Cincinnati by the appellee and its associates, the Northern railroads, in their quarterly statements to the bridge company, stated the amount of traffic that was furnished by the Louisville & Nashville, and in their remittances remitted to the bridge company the proportion of the surplus which belonged to it, save and except the "Air Line" and "Monon," which defaulted in the payment of all tolls. In this way, and from 1892 to 1895, both inclusive, the appellee regularly in periodical installments paid to the bridge company under this new agreement the proportion of the rebates which belonged to the Louisville & Nashville. These rebates were used by the bridge com-

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pany in meeting the deficit, in dividends and other fixed charges, caused by the failure of the "Air Line" and "Monon" to pay any tolls, as set forth in the former appeal in 115 Ky. 176, supra. In 1896, instead of a surplus, there was a deficit in the earnings of the bridge company, and this deficit brought about a default in the dividends, which in turn aroused the stockholders, and thus brought about the present litigation, which was instituted in September, 1897.

The Louisville & Nashville Railroad Company had accurate knowledge of its proportion of the rebates from the years 1892 to 1895, inclusive, which were furnished to it under the agreement above referred to; but for the years prior to 1892 it had no such information, though it knew it had been excluded from participation. To obtain this information for the years prior to 1892 would require a great deal of work in the examination of waybills and original documents in its archives, and, as stated by its counsel, it was fearful whether or not a compilation of sufficient proof could be thus made. To circumvent these difficulties, in the year 1892 it filed two suits against the bridge company to recover the proportion of the surplus earnings of which it had been deprived. In one suit it sought to recover its proportion of these earnings from the year 1880 down to and including the year 1891; and in the other suit it sought to recover its proportion of these earnings from the years 1892 to 1895, both inclusive. Both suits were based upon an alleged breach by the bridge company of the contract of June 5, 1872, in that the tolls had been maintained at a rate in excess of that which would merely meet the obligations of the contract, and in this way a surplus had been accumulated and divided, to its exclusion. It pressed to a speedy judgment the suit

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brought to recover for the years 1892 to 1895, inclusive, and withheld a prosecution of the suit for anterior years until it had recovered judgment for the latter years. The result of the prosecution for the latter years—that is, for the years 1892 to 1895, both inclusive—was a judgment in its favor on the 27th day of June, 1896, against the Louisville Bridge Company. At the time of the filing of the original petition in the present suit this judgment had been recovered; but at the instance of the railroads, as set forth in the previous appeal (115 Ky. 176, supra), was still in process of litigation; but the suit to recover for the years anterior to 1892 had not, at the filing of the petition in the present litigation, been prosecuted to a final judgment.

The original petition in the case at bar sought to recover by way of indemnity on behalf of the bridge company whatever amount might be ultimately adjudged against it in favor of the Louisville & Nashville Railroad Company by virtue of the suit involving the years 1892 to 1895, both inclusive, and referred to the suit for the anterior years as a merely pending matter. It was then a question whether there would be any recovery against the bridge company for these years prior to 1892. The allegations in the pleadings in a general way referred to the accumulation and division of all of these surplus earnings as a wrong committed by the appellee and its predecessor upon the bridge company, and the issues joined on the original pleadings are sufficient for a recovery in tort. At the time of the previous appeal in 115 Ky. 176, supra, the judgment of the Louisville & Nashville for the years from 1892 to 1895, both inclusive have been affirmed by this court in 106 Ky. 674, supra, and had been paid off. It appeared from the evidence,

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the agreed facts, and the presentation of the case on that appeal, that the stockholders in the right of the bridge company were seeking to recover from the appellee the full amount of the loss suffered in contractual dividends by the payment of the judgment as an operating expense under the contract of June 5, 1872. The contention then was that under the contract the contracting railroads were liable for the operating expenses and the dividend jointly and severally, and that this loss was an operating loss, and therefore to be recovered against one or all of the contracting railroads. This court did not take this view, and in the opinion in 115 Ky. 176, supra, it was held that as the deficit in dividends had come from an application to operating expenses and other obligations under the contract of June 5, 1872, of the amounts paid to it in the office of a stakeholder, for the purpose of the then pending suit of the Louisville & Nashville Railroad Company, the loss was not an operating charge, but was an independent loss of the bridge company, to fall upon its dividends or capital. The matter could not have been otherwise adjudged, as the appellee in regard to the matter then before the court had committed no wrong either in the accumulation or division of surplus earnings. It had agreed to and actually paid periodically its whole contribution as called by the contract, and that the only misfortune of the bridge company was that it had used these contributions to meet other losses occasioned by the entire default of two other contracting parties to pay anything whatever. What the opinion of this court on that appeal, therefore, has to say with regard to the first judgment of the Louisville & Nashville recovered against the bridge company for the years 1892 to 1895, both inclusive, has no

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bearing upon the loss suffered under the subsequent judgment in the case now before the court, unless the facts are the same.

The claim of the Louisville & Nashville for its proportion of the surplus earnings of the bridge company for the years anterior to 1892 also resulted in a judgment in its behalf against the bridge company for the years 1888 to 1891, both inclusive. Its proof failed as to years antedating 1888. This judgment was for $150,775.88, and was affirmed by this court in 116 Ky. 258, 25 Ky. Law Rep. 405, 75 S. W. 285, under the style of "Louisville Bridge Company v. L. & N. R. R. Company." At the conclusion of the opinion in that case this court expressly withheld intimating any opinion upon the merits of any controversy that might arise between the bridge company and the present appellee. This judgment was paid off by the bridge company on the 11th day of January, 1904, and it amounted then to $314,534.35. Of this sum the appellee Pittsburg, Cincinnati, Chicago & St. Louis Railway Company furnished the amount of $170,204.97, on the contention that it had received of the surplus tolls owing to the Louisville & Nashville thus wrongfully accumulated and distributed only this amount, and that the balance of the amount had been distributed to other Northern railroads, and, as they were insolvent, the bridge company must suffer that loss. The present litigation is to determine this question; that is, whether or not this loss must fall upon the bridge company or fall upon the appellee Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. By appropriate pleadings these facts are set forth, and it is sought on behalf of the bridge company to recover this amount of $144,329.28, which it was compelled to take out of the dividend

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fund, under the contract, from the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, on the theory that it was under its management of the bridge company through its first, second, and third vice presidents that the tolls were kept at a rate that would accumulate a surplus, and that it was by its tort through these officers, who controlled the bridge company, that this surplus thus wrongfully accumulated was again wrongfully distributed to the advantage of the appellee Pittsburg, Cincinnati, Chicago, & St. Louis Railway Company and its predecessor, and that thus, the appellee having wrongfully accumulated the surplus and having wrongfully divided it between itself and its associates, it cannot now relieve itself of liability by returning only that proportion which it received of the share of the Louisville & Nashville; that the wrong is a joint and several tort, for which it or all of the wrongdoers must account.

It appears to the court from the facts which are not disputed that the agreement of the year 1880 or 1881, by which the surplus in question was accumulated, was wrongful and a fraud upon the Louisville & Nashville, and that the division of that surplus for the years in question was wrongful and was a fraud upon the Louisville & Nashville, and that this result was accomplished wholly by virtue of the control which the appellee Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and its predecessor had over the bridge company through the stockholding interest of the Pennsylvania Railroad Company, in and by virtue of which the first, second, and third vice presidents of the appellee and its predecessor were elected to the board of directors of the bridge company and controlled its action. This control alone, by virtue of the officers which the two corporations had

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in common, would not be sufficient to mulct the appellee for the entire loss brought about by their wrongdoing, as was well said in the opinion of the trial judge. It appears, however, beyond question, that the first, second, and third vice presidents of the appellee and its predecessor, who controlled the bridge company, did not manage or operate the bridge company to their individual profit; nor does it appear that any official action was taken by any of these officers for their individual aggrandizement. Their whole effort and intent was to manage the bridge company as a part and parcel of the Pennsylvania System. The Pennsylvania interest was their interest, and it was to further that interest that the contract was violated by keeping the tolls higher than the contract permitted and that the surplus thus accumulated was distributed among the Pennsylvania interests and the other railroads taken into the agreement. In short, there was no damage suffered by the bridge company by the accumulation of surplus. The damage was in the division, and this division was not among corporate officers, but among contracting railroads, one of which was the appellee and its predecessor, which had complete control of the bridge company through their common officers; and that it is this feature that makes the appellee responsible jointly and severally for the entire loss brought about by this wrongdoing. While the officers of the appellee were elected to the directory of the bridge company by the Pennsylvania Railroad, their management and control of the bridge company was wrongful to the bridge company and to the profit of the appellee, and it was the appellee as an entity that received and enjoyed this profit from this wrongful act, and therefore, under the principles of law

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controlling such cases, it cannot enjoy the profit without suffering the correlative duty of liability for the loss.

It is not necessary in this opinion again to refer to the duties and obligations of a corporation to its stockholders, nor to the rights of the stockholders when the corporate organization of one corporation is controlled by outside or community interests. This matter has been fully considered on the previous appeal in 115 Ky. 176, supra, and it was because of this situation that the right of the minority stockholders to maintain this action in equity was there maintained. As an original proposition, therefore, the court concludes that the loss suffered by the bridge company on account of the accumulation and division of its surplus earnings adjudged to the Louisville & Nashville Railroad Company for the years 1888 to 1891, both inclusive, was a wrong and a tort committed upon the bridge company on behalf of and to the interest of the appellee, and that appellee is liable for the entire loss, and will not be permitted to repay only that proportion of the wrongful distribution which it received, leaving the bridge company to suffer the remainder, but that it must pay the entire loss; and as it has only a part, and the bridge company by virtue of the judgment has been compelled to pay the balance, it must now return to the bridge company what was thus paid by it, with interest and costs.

It is contended, however, on behalf of the appellee, that, though this be correct as an original proposition, it is foreclosed as a recovery to the bridge company by virtue of the previous judgment in this case on the principle of res judicata. It is conceded that the claims arising under the two judgments are not the

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same, even though they be the result of a splitting of one entire cause of action into two, as animadverted upon in the appeal of Bridge Company v. L. & N. R. R. Co., 116 Ky. 258, 25 Ky. Law Rep. 405, 75 S. W. 285. While the cause or causes of action on behalf of the Louisville & Nashville Railroad Company against the bridge company for both losses proceeded upon the same ground, and judgments in both were recovered on the theory of a breach of the contract of June 5, 1872, between it and the bridge company, it by no means follows that the relation of the bridge company to these causes of action is identical. On the contrary, it appears from the agreed stipulation of facts that the source and cause of the losses to the bridge company were separate and distinct, or, in other words, that it was caused to break its contract with the Louisville & Nashville by virtue of separate and distinct forces. It appears that its failure to pay the Louisville & Nashville its proportion of the surplus for the years 1892 to 1895, both inclusive, was caused by its failure to collect any tolls from the "Air Line" and "Monon," and therefore, instead of paying the Louisville & Nashville what it had received in its behalf, it wrongfully applied the fund to other sources of expense. On the other hand, it appears that it was never in possession of any part of the surplus rightfully belonging to the Louisville & Nashville, for the years anterior to 1892, and that its failure to pay the Louisville & Nashville its proportion of the surplus earnings for these years anterior to 1892 was caused solely by virtue of the agreement of the Northern railroads, formed in 1880 or 1881, by virtue of which the Louisville & Nashville was collusively excluded from participating, and its proportion of the surplus was distributed among

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the Northern railroads; and all of this was accomplished by virtue of the control which the appellee had over the bridge company through their officers in common, and this control was exercised and exclusively for the profit of the appellee. It thus results that, not only is the relation of the bridge company to the two losses separate and distinct causes of action, arising upon separate and distinct judgments, but that they are also founded in separate and distinct causes—one in its own breach of contract, and the other in a wrong or tort, originally intended against the Louisville & Nashville alone, but which resulted in a loss for the bridge company alone. Therefore no fact nor conclusion adjudged on the former appeal has any controlling effect upon, or is it a precedent, for any question involved here.

The cause of action of the bridge company here does not move upon the contract of June 5, 1872, but moves entirely in tort. The cause of action in the previous appeal moved entirely upon the contract, and it was there sought to recover the loss there suffered as an operating expense or loss. Neither the cause of action, nor the facts supporting them, nor the theory upon which the claims are litigated, are the same, or even similar. The cases cited by counsel for the appellee, (Tigo R. R. v. Blossburg, etc., R. R. 20 Wall. [U. S.] 137, 22 L. Ed. 331; City of New Orleans v. Citizens' Bank, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; Davis v. McCorkle, 14 Bush, 746), have no bearing on the case at bar. Those cases apply to an interpretation placed upon a contract when the same contract is again in litigation between the parties, or to a second appeal of the same case, which was the instance in Davis v. McCorkle. The principles of law distinguishing the

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present appeal from the previous appeal were stated by the Supreme Court of the United States in Cromwell v. County of Sac, 94 U. S. 351, 24. L. Ed. 195, Davis v. Brown, 94 U. S. 423, 24 L. Ed. 204, and Russell v. Place, 94 U. S. 606, 24 L. Ed. 214, and have since been universally followed by the courts, state and federal, and accepted as sound by all text-writers on the subject of res judicata. See Black on Judgments (2d Ed.) vol 2, sections 506, 509, 614, 617, 618, 630, 726, 730, 733, 750; Schmidt v. Railroad, 119 Ky. 287, 20 Ky. Law Rep. 456, 810, 84 S. W. 314; Schuster v. White, 106 Ky. 317, 50 S. W. 242, 20 Ky. Law Rep. 1852; City of Newport v. Commonwealth, 106 Ky. 434, 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518; Yates v. Utica Bank, 206 U. S. 181, 27 Sup. Ct. 646, 51 L. Ed. 1015; Southern Pacific v. U. S., 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307; Third National Bank v. Stone, 174 U. S. 432, 19 Sup. Ct. 759, 43 L. Ed. 1035. We do not understand counsel for appellees to dispute the principles of law decided by these cases. Their disputes touches the application of these principles, and as this in turn must be controlled by the pleadings and facts, and as we find both the pleadings and facts regarding the loss suffered by the bridge company under the judgment of the Louisville & Nashville now in question are separate and distinct from those applicable to the other loss suffered under the judgment before this court on the previous appeal in 115 Ky. 176, supra, there is no estoppel. The present case moves in pleadings and fact upon wrong-doing and tort. The previous case in pleadings and facts moved upon a contract liability of the railroads to indemnify the bridge company against all losses on the theory of their being operating expenses, or in all events to be indemni-

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fied against loss under the provisions of the contract.

It is contended, however, by appellee, that the theory of tort as a foundation for the present recovery cannot be maintained, for the reason that this theory was not directly and distinctly advanced until the reply came to be filed by the plaintiffs on May 7, 1904. We think, however, this is sufficient, as the appellee joined issue and the matter was litigated upon that theory. A similar condition was before the court in the case of Louisville Bridge Company v. L. & N., 116 Ky. 258, 75 S. W. 285, where the principle of estoppel was enforced against the bridge company, claiming a splitting of a cause of action after the splitting had been suffered and issues had been joined. Aside, however, from this principle of estoppel against the appellee to make this claim, we do not agree with the appellee that the reply is a departure. It appears to the court that it was in the nature of a pleading of a matter in estoppel of the appellee's plea of res judicata, and thus permitted by section 101 of the Civil Code of Practice.

The contention of appellee that if any recovery is adjudged it can only be against the Pennsylvania Railroad, because the proof of wrongdoing points to it alone, if to any one, is not maintainable, for the reason that as far as the Pennsylvania Railroad is connected with the matter it is only by virtue of its election to the directory of the bridge company through its stockholding interest of the first, second, and third vice presidents of its subsidiary companies. It does not appear, however, that any wrong was done to the advantage of the Pennsylvania Railroad, further than that advantage which results from its ownership of 57 per cent. of the stock of the appellee company. The wrong that was done in the accumula-

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tion of the surplus earnings was the direct wrong of the first, second, and third vice presidents of the appellee company, who also controlled and directed the affairs of the bridge company; and the wrong done in the division of these earnings was not in the payment of any profits to the Pennsylvania Railroad Company, but in the payment of profits directly to the appellee. It was the appellee who received the benefit of the wrongdoing, and this by virtue of its control through common officers of the bridge company. It is the appellee, therefore, who must pay the loss which the bridge company has suffered.

The theory which is advanced that the accumulation and division of this surplus was an act intra vires the Louisville Bridge Company and to postpone competition in the erection of rival bridges is not maintainable. Among others is the sufficient reason that any bona fide scheme to postpone rivalry and thus conserve the interest of the bridge company as a direct entity would necessarily have counted upon the Louisville & Nashville Railroad Company as a participant; for without it no such scheme could have been feasible. At the time in controversy it was the only road at Louisville having an outlet to the south. A fair scheme between the railroads would have contemplated an interchange of traffic, and this would have been impossible without the Louisville & Nashville. The scheme in controversy, in which surplus earnings were accumulated and divided, not only ignored the Louisville & Nashville, but from the agreed facts it must be concluded that it was concealed from the Louisville & Nashville. An accumulation and division of surplus earnings fair to all of the railroads must necessarily have taken in the Louisville & Nashville as a factor, and thus only the

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public would have been the sufferer. But the agreement here in question not only made the public the sufferer, but at the same time divided that which should, under fair agreement, have gone to the Louisville & Nashville among the other roads; and it is this unfair agreement solely as to the Louisville & Nashville that brought the loss now litigated upon the bridge company.

The fourth paragraph of the answer of appellee, filed May 7, 1904, pleads that the cause of action of the plaintiff occurred at each quarter of the year when the rebates were distributed, and that, as the last distribution occurred on December 31, 1891, more than 10 years have elapsed, and the cause of action is therefore barred by the statute of limitations. This plea is not maintainable, for the reason that by the distribution of the surplus alone, as hereinbefore set out, the bridge company was not damaged. It had no cause of action until the wrong of the appellee in the accumulation and distribution brought upon it a loss. It is a juncture of wrong and damage that gives rise to a cause of action, and that this did not occur, as far as the bridge company is concerned, until it was compelled to pay the judgment recovered by the Louisville & Nashville, and therefore the statute of limitations has no application to the case at bar. The claims and contention of appellants appeal most strongly to our sense of justice. Through no fault of theirs, or any one having the interests of the bridge company at heart, was any act done or wrong committed which occasioned a loss to the bridge company; but appellees and their predecessors, through their officers, who dominated and controlled the directory of the bridge company, have brought upon the bridge company the loss which it has sustained by conspir-

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ing together for the fraudulent purpose of defrauding the Louisville & Nashville Railroad Company, and later carrying out this conspiracy through this same instrumentality by illegally collecting from the Louisville & Nashville Railroad Company, between the years 1880 and 1891, more than $900,000, and during the period covered by this litigation, to wit, 1888 to 1891, inclusive, more than $300,000, and, having thus wrongfully, unlawfully, and fraudulently collected these large sums, they caused the officers of the bridge company, who were in fact the officers of appellee and its predecessor, to distribute same among the Northern railroads, and, while this distribution or apportionment of rebates thus filched from the coffers of the Louisville & Nashville Railroad Company was apparently or formally made by the bridge company, yet it was in fact and in truth not the act of the bridge company, but the work of appellee and its predecessor. Appellee and its associates conceived the plan by which this wrong could be done, and they chose as the instrument for carrying out their unlawful purpose the bridge company. In order that there might be no miscarriage of their plan and arrangement to enrich themselves at the expense of the Louisville & Nashville Railroad Company, it was necessary that they should have absolute control of the directory of the bridge company; and therefore they chose as directors of the bridge company the first, second, and third vice presidents of appellee company, men who had no interest, pecuniary or otherwise, in the welfare of the bridge company, but whose sole aim and purpose was to serve and subserve the interests of appellee company and its predecessor.

Upon discovering that it had been discriminated

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against and unfairly dealt with, the Louisville & Nashville proceeded to recover the moneys unlawfully and wrongfully collected from it. Every court of justice in which its cause was heard promptly decided that it was entitled to recover back so much of the money illegally taken from it as it was able to show had been so done. Can it be successfully maintained, under any principles of equity, justice, or right, that the bridge company, and especially the minority stockholders, should be made to bear the burden of this wrong, while appellee and its predecessor, who were directly responsible for it, escape liability? Clearly we think not. As between the bridge company, which was in fact innocent of any wrongdoing, and appellee and its predecessor and associates, who were responsible for all of the wrongs and mismanagement complained of, the burden should fall upon appellee. And this conclusion is strengthened by the further fact that, when restitution is demanded of them, appellees, while practically admitting the charges against them, seek to avoid responsibility upon technical and other grounds which, for the reasons above given, we have deemed insufficient.

It is therefore adjudged that the judgment of the lower court be reversed, and this case is now remanded to the court below, with instructions that a judgment be entered in favor of the plaintiffs, for the use and benefit of the bridge company, for the sum of $144,329.28, with 6 per cent. per annum interest thereon from the 11th day of January, 1904, and costs.

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WILLS—Continued—
tribution, the words, in the absence of a contrary intent, create a defeasible fee, defeated by death at any time without issue. Simpson v. Adams.....790
9. Same—Estates Acquired.—Testator devised his real estate to his grandsons, directed that each of them should pay to a third person an annual sum for life, and provided that, if either of the grandsons should die without children, the property devised should descend to the survivor and his descendants. Held not to create an estate tail, converted into a fee simple under Ky. Stats., 1903, section 2343; the word "body," or some other words of procreation, being necessary to make an estate tail. Idem.....790
10. Same.—Testator gave his household goods, etc., to his daughter for life, and at her death to her two sons, or the survivor of them, or their descendants. Held, That the property passed at the daughter's death to the sons then living absolutely. Idem.....790
11. Same.—Testator devised real estate to his grandsons, subject to a certain charge, and directed that, if either of the grandsons should die without children, the property should descend to the survivor and his descendants. Held to vest the fee simple in the grandsons, subject to be defeated as to either by his dying without issue at any time. Idem.....790
12. Same—Title of Purchaser from Devisees.—Testator devised real estate to his grandsons, vesting in them the fee simple, subject to be defeated as to either dying without issue at any time. The grandsons and their mother mortgaged the premises, and a third person purchased the same at a foreclosure sale. He thereafter conveyed the premises to the mother, who failed to pay the purchase money notes, and the land was ordered sold to pay them. The third person became the purchaser. Held, That the third person acquired complete title to the land, except the contingent remainder vested by the will in the descendants of either of the grandsons, if either should die without issue after the death of the other with issue living. Idem.....791
13. Pleading—Allegation of Facts.—An amended pleading, which alleges that the proof shows a certain thing to be true and that the proof is uncontradicted, is properly disallowed, for pleadings should positively allege the existence of facts. Idem 791
14. Judgment—Foreclosure of Vendor's Lien—Conclusiveness.—A judgment enforcing a vendor's lien to the amount of purchase-money notes is conclusive on the question whether the notes

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WILLS—Continued—
were in part without consideration, and such a defense is not available in a suit to quiet title by the purchaser at the foreclosure sale. Idem.....791

WRONGFUL SALE—See Attachment 4.

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